NO. 02-18-00138-CR

IN THE COURT OF APPEALS FILED IN FOR THE SECOND DISTRICT OF TEXASORT WORTH, TEXAS AT FORT WORTH 6/1/2020 11:26:04 PM

NERRA SPISAK

Clerk

CRYSTAL MASON,

Appellant,

V. STATE OF TEXAS,

Appellee.

On appeal from 432nd District Court
Of Tarrant County, Texas
In Cause No. 148710D
The Honorable Ruben Gonzalez, Jr. Presiding

APPELLANT'S MOTION FOR EN BANC RECONSIDERATION

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Reasons to Grant En Banc Reconsideration

Crystal Mason submitted a provisional ballot under the Help America Vote Act (HAVA). Her ballot was rejected and never counted. But she was convicted under the Election Code and sentenced to five years in prison for "vot[ing] ... in an election in which the person knows the person is not eligible to vote." Tex. Elec. Code, §64.012 (emphasis added).

The panel's Opinion affirms the conviction and holds that an individual who submits a provisional ballot that is rejected, may be prosecuted for illegal voting even if she **did not know** that she was ineligible to vote in the election. This result, never argued for by the State, is contrary to the language of the statute and violates the purpose of HAVA. It also cannot be squared with *Delay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014), another criminal prosecution under the Election Code. *Delay* held that when knowledge is an element of the offense, the accused must "actually realize[]" the conduct violated the Election Code. *Id.* at 251-52.

The Opinion is not isolated to an obscure statute that affects only a handful of citizens. In 2016, 44,046 provisional ballots were rejected in Texas because the individuals were not properly registered where they voted, App'x.3, including citizens who moved but failed to re-register, went to the wrong polling location, or neglected to timely register. Under the Opinion, all of these citizens could be subject to felony prosecution.

The Opinion's jurisprudential errors and its far-reaching consequences, result in an "extraordinary circumstance[]" that merits en banc reconsideration. Tex. R. App. P. 41.2(c).

Summary of Argument

- (1) The Court should reconsider the holding that Section 64.012(a)(1) did not require Ms. Mason to know she was not eligible to vote. That holding cannot be reconciled with the statute, which criminalizes "vot[ing] ... in an election in which the person knows the person is not eligible to vote." Tex. Elec. Code §64.012(a)(1) (emphasis added). As if that weren't clear enough, the Court of Criminal Appeals provided clear guidance six years ago in *Delay*, 465 S.W.3d 232. That case analyzed a similar statutory requirement that an individual know that their actions violated the Election Code. The Court held that this required that the individual "actually realize[]" the conduct "in fact" violated the Election Code. *Id.* at 252 (emphasis added). The Opinion cannot be squared with *Delay*, and impermissibly reaches an argument never presented by the State.
- (2) The Court should reconsider the holding that submitting a provisional ballot that is rejected constitutes "vot[ing] in an election" under Section 64.012(a)(1). The Opinion failed to properly credit numerous contrary uses in the Election Code and dictionaries, including the Election Code's use of the verb "casts" instead of "votes" when discussing provisional ballots. These contrary usages at

least demonstrate ambiguity with respect to the term "votes." When an ambiguity arises in a criminal prosecution outside the Penal Code, the Rule of Lenity requires that the ambiguity be resolved in favor of the defendant. The Opinion fails to resolve this ambiguity in favor of Ms. Mason.

Moreover, the Opinion holds that "to vote—can be broadly defined as expressing one's choice, regardless of whether the vote actually is counted." Op.27. That leads to illogical results: filling out a ballot and handing it to an election judge who immediately throws it away would constitute voting subject to criminal punishment.

Finally, the Opinion's interpretation violates principles of statutory construction by rendering superfluous Section 64.012(a)(1)'s reference to an "attempt to vote" because the attempt would be subsumed by the Opinion's definition of voting.

(3) HAVA preempts the Opinion's interpretation that criminalizes the submission of provisional ballots by citizens who have a good faith but mistaken belief that they are eligible to vote. The Opinion is contrary to the text and purpose of HAVA, which exists to remedy uncertainty about eligibility at the polling place by allowing individuals to provisionally submit ballots. Upholding the Opinion could subject tens of thousands of Texans who submit provisional ballots to potential prosecution.

Argument

I. The Opinion erred in holding that Ms. Mason did not need to know that she was ineligible to vote.

Under Section 64.012(a), "a person commits an offense if the person: (1) votes or attempts to vote in an election in which the person **knows** the person is not eligible to vote." (emphasis added).

The Opinion conceded that "[t]he evidence does not show that [Ms. Mason] voted for any fraudulent purpose." Op.36–37. That should have ended the inquiry. Instead, the Opinion held that Ms. Mason's knowledge that she was on supervised release was sufficient to meet the knowledge requirement. Op.13–17. The Opinion reasoned that since Ms. Mason knew the underlying circumstances rendering her ineligible, the law presumed her knowledge of the legal consequences of those circumstances. *Id.*

Reconsideration of this interpretation is necessary to correct its direct conflict with controlling precedent and the Opinion's extraordinary departure from the State's theory. Tex. R. App. P. 41.2(c).

A. The Opinion conflicts with *Delay*.

The Opinion directly conflicts with *Delay*, which holds that where an Election Code statute requires that an individual "know" that their conduct violates the Election Code, the person must "actually realize[]" the conduct "in fact" violates the Election Code. 465 S.W.3d at 252.

In *Delay*, the Court of Criminal Appeals analyzed Section 253.003(a) of the Election Code, which states, "[a] person may not knowingly make a political contribution in violation of this chapter." The Court's analysis had three steps. **First**, it held that "knowingly" undertaking an action in violation of the Election Code means "that the actor be aware, not just of the particular circumstances that render his otherwise-innocuous conduct unlawful, **but also of the fact that undertaking the conduct under those circumstances in fact constitutes a 'violation of' the Election Code."** 465 S.W.3d at 250 (emphasis added).

Second, in reaching this holding, the Court determined that "knowingly" modified the fact that the conduct violated the Election Code. *Id.* at 250–51. The Court noted ambiguity regarding "whether the word 'knowingly' in the statute modified merely the making of a campaign contribution, or whether it also modified the statutory circumstance that the contribution was made 'in violation of' the Election Code," *id.*, and invoked the Rule of Lenity in criminal prosecutions outside the Penal Code, which requires that ambiguity must be resolved in favor of the defendant, *id.*

Third, the Court analyzed the facts before it and held that they did not show a violation because "nothing in the record shows that anyone associated with the contributing corporations **actually realized** that to make a political contribution

under these circumstances **would in fact** violate Section 253.003(a) (or any other provision) of the Texas Election Code." *Id.* at 252 (emphasis added).

Despite the obvious precedential importance of *Delay*, the lengthy Opinion mentions it only once, in a footnote. And when it does, it mistakenly attributes Delay's holding that an individual must "actually realize[]" that their conduct "in fact" violates the Election Code to the Court's holding that Section 253.003(a) is ambiguous. Id. But the discussion of ambiguity and the Rule of Lenity occurs when discussing the second step—determining whether "knowingly" modifies the requirement that the political contribution is in violation of the chapter. Id. at 250-51. Unlike *Delay*, the Opinion did not need to "resolve[] ambiguities with respect to the scope of the applicable mens rea in favor of making sure that mental culpability extends to the particular circumstance that renders otherwise innocuous conduct criminal." *Id.* at 251. Here, "know[ing]" clearly modifies the ineligibility to vote—the relevant violation of the Election Code. But that does not distinguish Delay in any relevant fashion, because, having established that "knowingly" modified the fact that the action violated the Election Code, the *Delay* Court still had to analyze what it means to "knowingly" violate the Election Code—just like the Opinion had to determine what it means for an individual to know they are ineligible to vote.

With respect to this question, *Delay* dictates the outcome of this case. In its **first and third steps**, *Delay* established that the statutory requirement that an individual knowingly violate the Election Code requires **both** knowledge of the underlying circumstances **and an actual realization** that the conduct violated the Election Code. Absent proof of "knowledge of actual unlawfulness," the State cannot sustain a conviction. *Id.* at 250, 252. The *Delay* Court did not, as the Opinion would have it, conclude that individuals were charged with knowledge of the law and therefore the requirement that an individual know their action violated the Election Code required knowledge only of the underlying circumstances that were in violation of the Election Code—there only that the money was in fact transferred from the PAC to individual campaigns. The Court required an actual realization that the transfer also constituted a violation of the Election Code.

Thus, applying the binding precedent of *Delay* here, the State was required to prove not only that Ms. Mason knew she was on supervised released and that she voted (the "otherwise innocuous conduct"), but also that she **knew** that "that undertaking the conduct under those circumstances in fact constitutes a 'violation of' the Election Code." *Id.* at 251. By affirming a conviction based on nothing more than Ms. Mason's knowledge that she was on supervised release, while the Election

Code section requires knowledge of her ineligibility, the Opinion directly conflicts with *Delay*. ¹

A cynical observer might conclude that the difference between these cases is that one involves a nationally known and prominent politician, while the other involves a woman who enjoys none of that power or influence. The Court would be better served by an Opinion that does provide any ammunition to support that argument. Application of *Delay*'s precedent to Ms. Mason is not only jurisprudentially required, but required out of fairness as well.

B. Delay controls over the Opinion's cited authority.

In lieu of discussing *Delay* outside of one footnote, the Opinion relies on a century-old case from the Texas Court of Appeals, *Thompson v. State*, 9 S.W. 486 (Tex. Ct. App. 1888),² and decisions from other courts of appeals. *See* Op.14-17 (citing *Jenkins v. State*, 468 S.W.3d 656, 672—73 (Tex. App.—Houston [14th Dist.] 2015), *pet. dism'd*, *improvidently granted*); and *Medrano v. State*, 421 S.W.3d 869, 884—85 (Tex. App.—Dallas 2014, pet. ref'd)). These cases are all contradicted by *Delay*—the Court of Criminal Appeals' most recent, on-point authority.

¹ Reconsideration of this error will necessitate reconsideration of other parts of the Opinion that rely on this interpretation. *E.g.* Op.34, Op.49.

² *Delay* abrogates any contrary reasoning in *Thompson*; however, to the extent this Court finds that *Thompson* is controlling despite being irreconcilable with *Delay*, it should rewrite the Opinion to acknowledge this contradiction explicitly.

The Opinion also cites Penal Code Section 8.03(a), which excludes ignorance of the law as a defense to prosecution. Op.14. However, the statute requires the State to prove **as an element of the offense** that Ms. Mason voted when she knew she was ineligible. *See Bryant v. State*, 643 S.W.2d 241, 243 (Tex. App.—Fort Worth 1982, no pet.) ("Under the penal code, the culpable mental state is expressly made, not a defense, but an element of the offense.").

C. The Opinion conflicts with precedent interpreting similar mens rea requirements.

The Court of Criminal Appeals has interpreted Texas's Abuse of Official Capacity statute, which makes it illegal for a public servant to intentionally or knowingly "violate[] a law relating to the public servant's office or employment," Tex. Penal Code §39.02(a)(1), to require that "a defendant must 'know' that his conduct which constitutes 'mistreatment' is unlawful." *State v. Edmond*, 933 S.W.2d 120, 127 (Tex. Crim. App. 1996); *see also Ross v. State*, 543 S.W.3d 227, 234–35 (Tex. Crim. App. 2018) ("evidence was insufficient to prove beyond a reasonable doubt that Ross knew that her conduct was unlawful" under Texas's Official Oppression statute).

Recent U.S. Supreme Court precedent is in accord. In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), a case involving federal prosecution for possession of a firearm, the Court found that the requirement that the defendant know he was in the United States illegally was necessary to separate criminal conduct from innocent

mistakes that should not be criminalized. *Id.* at 2196-97. "Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach." *Id.* at 2197.

The *Rehaif* Court rejected the argument that ignorance of the law was not a defense, holding that:

[t]he defendant's status as an alien "illegally or unlawfully in the United States" refers to a legal matter, but this legal matter is what the commentators refer to as a "collateral" question of law. A defendant who does not know that he is an alien "illegally or unlawfully in the United States" does not have the guilty state of mind that the statute's language and purposes require.

Id. at 2198; *see also Liparota v. United States*, 471 U.S. 419, 425 (1985) (interpreting statute to require government to show defendant knew conduct was unauthorized by statute or regulations).

Rehaif is analogous to this case. Voting is not criminal conduct. Rather, it is the status of the individual—eligible or ineligible—that renders the conduct potentially criminal. Accordingly, a defendant like Ms. Mason who does not know that she is ineligible to vote does not have the guilty state of mind the statute's language and purpose requires.

D. The Opinion impermissibly reaches beyond the State's position.

The Opinion's holding that Ms. Mason did not need to know she was ineligible to vote was not urged by the State at trial or on appeal. The Opinion

acknowledges that the authority it relies on was not briefed by either party. Op.14 n.12.

Upholding a criminal conviction based on a theory not urged by the State violates the principle of party presentation and infringes on due process. "In our adversary system ... we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).

The Court should reconsider the Opinion and render one "bearing a fair resemblance to the case shaped by the parties," without the Opinion's flawed interpretation of the knowledge requirement. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1582 (2020) (remanding for reconsideration where opinion strayed too far from issues argued by the parties).

II. The Opinion erred in holding that submitting a provisional ballot that is rejected constitutes "vot[ing] ... in an election."

The Opinion's holding that submitting a provisional ballot that is rejected constitutes "vot[ing] ... in an election" is based on its conclusion that "to vote—can be broadly defined as expressing one's choice, regardless of whether the vote actually is counted." Op.27. That conclusion is not in uniformity with established principles of statutory construction and should be reconsidered. Tex. R. App. P. 41.2(c).

A. The Opinion fails to acknowledge ambiguity that must be resolved in favor of Ms. Mason.

The Opinion failed to credit numerous uses of the term "vote" in the Election Code that clearly refer only to counted ballots. Section 2.001 provides that "[t]o be elected to a public office, a candidate must receive **more votes** than any other candidate." (emphasis added); *id.* §2.002(a) ("[I]f two or more candidates ... tie for the number of votes required to be elected, a second election to fill the office shall be held."). Of course, uncounted ballots are not considered "votes" that determine who wins an election in Section 2.001.³

The Opinion does not discuss these uses, contrary to fundamental principles of statutory interpretation. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018), *reh'g denied* (June 22, 2018) ("Looking to the statutory scheme, we strive to give the provision a meaning that is in harmony with other related statutes.").⁴

Second, although the Opinion recognized that "the Election Code's provisional-ballot provisions speak in terms of 'casting' such a ballot," Op.27 n.20, it erroneously assumed that the Code uses the verb "casts" interchangeably with the

³ Although these examples use the term "vote" as a noun, that usage informs interpretation of the verb "to vote." *See State v. Stubbs*, 502 S.W.3d 218, 236 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

⁴ Instead of analyzing Election Code provisions, the Opinion cites to Penal Code §36.01(4). Op.26. However, that definition arises in an entirely separate context—the offense of bribery—and still at best demonstrates ambiguity.

verb "votes." *See also* Tex. Elec. Code §63.011 (establishing requirements for when a person "may **cast** a provisional ballot") (emphasis added); *id.* §65.059 (for "a person who **casts** a provisional ballot" requiring a system to determine if ballot was counted) (emphasis added). That assumption contradicts this Court's guidance that "when the legislature uses certain language in one part of the statute and different language in another, we presume different meanings were intended." *Liverman v. State*, 447 S.W.3d 889, 891 (Tex. App.—Fort Worth 2014), *aff'd*, 470 S.W.3d 831 (Tex. Crim. App. 2015). Thus, under the Election Code, submitting a provisional ballot that is rejected is not the same as "voting in an election."

Third, the Opinion failed to consider dictionary definitions contrary to its holding. Op.26. Webster's Dictionary specifically defines vote as "to express one's views in response to a poll **especially: to exercise a political franchise**." (emphasis added). Similarly, Black's Law Online Dictionary's first definition of vote is "**suffrage**." Ms. Mason did not exercise her political franchise or suffrage when she submitted a provisional ballot that was rejected; indeed, the State claims that until she completes her federal supervised release she has no franchise.

The difference between the examples set forth here and those discussed by the Opinion show, at the very least, an ambiguity in the statute. *Price v. State*, 434

⁵ Vote, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/vote_

⁶ Vote, Black's Law Online Dictionary, https://thelawdictionary.org/vote/.

S.W.3d 601, 605 (Tex. Crim. App. 2014) ("A statute is ambiguous when the statutory language may be understood by reasonably well-informed persons in two or more different senses").

As the Opinion acknowledged, ambiguities must be resolved in favor of Ms. Mason because this is a criminal statute arising outside the Penal Code. Op.11 ("[W]e must construe criminal statutes outside the penal code strictly, resolving any doubt in the accused's favor.") (citing *State v. Rhine*, 297 S.W.3d 301, 309 (Tex. Crim. App. 2009)). The Opinion's failure to do so was erroneous.

B. The Opinion's definition of voting would lead to illogical results.

A plain language meaning should be rejected where it "would lead to absurd consequences that the Legislature could not possibly have intended." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). The Opinion's definition that "to vote—can be broadly defined as expressing one's choice, regardless of whether the vote actually is counted," Op.27, leads to illogical consequences. If an individual walked into a polling place with a ballot filled out, but the election judge told her the ballot would not be accepted, no one would believe that she had "voted in an election." The same is true if an individual handed their ballot to the election judge who tore the ballot up or deposited the ballot in a receptacle marked "rejected

ballots."⁷ Because the Opinion's definition would illogically subject all of these individuals to prosecution, it should be rejected.

C. The Opinion renders superfluous the "attempt to vote" language of Section 64.012.

Section 64.012(a)(1) creates two separate criminal offenses: "a person commits an offense if the person: votes **or attempts to vote** in an election." Tex. Elec. Code §64.012(a)(1) (emphasis added). Illegal voting is a second degree felony—"unless the person is convicted of an attempt," which is "a state jail felony." *Id.* at (b). The State did not charge Ms. Mason with attempting to vote and, at oral argument, conceded that she did not attempt to vote.

By holding that expressing one's choice—regardless of whether that choice is counted—constitutes voting, the Opinion nullifies and renders superfluous the separate offense of attempting to vote, in violation of principles of statutory interpretation. *Ex parte Perry*, 483 S.W.3d 884, 902–03 (Tex. Crim. App. 2016) ("[E]ach word, clause, and sentence should be given effect if reasonably possible."); *Heckert v. State*, 612 S.W.2d 549, 552 (Tex. Crim. App. 1981) (rejecting interpretation of criminal statute that would render distinct statutory provisions a nullity).

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⁷ Ms. Mason's ballot was initially placed in a separate envelope pending review and then kept separate following its rejection. Tex. Elec. Code §64.008(b); *id.* §65.056. This is the equivalent of depositing her ballot in a box marked rejected ballots.

III. HAVA preempts the Opinion's interpretation of Section 64.012(a)(1).

HAVA permits people like Ms. Mason who believe they are eligible to vote to cast a provisional ballot, even when their belief turns out to be incorrect. The Opinion's interpretation of Section 64.012(a)(1) permits criminalization of this conduct, which conflicts with and is preempted by HAVA.

The adoption of an interpretation that directly conflicts with federal law and would subject tens of thousands of Texans to prosecution is an "extraordinary circumstance[]" that necessitates reconsideration. Tex. R. App. P. 41.2(c); *Nat'l Fed. of Ind. Bus. v. Sebelius*, 567 U.S. 519, 562 (2012) ("[I]t is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.").

A. HAVA preempts state law when there is a conflict.

Under the Supremacy Clause "when a state law conflicts with federal law, it is preempted and has no effect." *BIC Pen Corp. v. Carter*, 251 S.W.3d 500, 504 (Tex. 2008) (citations omitted).

Furthermore, "[t]he assumption that Congress is reluctant to pre-empt does not hold when Congress acts under [the Election's Clause], which empowers Congress to "make or alter" state election regulations." *Arizona v. Inter Tribal Council of Arizona, Inc.* ("ITCA"), 570 U.S. 1, 14 (2013). In the elections context, "the States' role in regulating congressional elections—while weighty and worthy

of respect—has always existed subject to the express qualification that it terminates according to federal law." *Id.* (citation omitted). If state law criminalizes a right guaranteed by a federal election law, the state law must give way and "ceases to be operative." *Id.* at 9 (citation omitted).

B. The Opinion's interpretation conflicts with HAVA.

The Opinion's interpretation of Section 64.012(a)(1) conflicts with HAVA because it criminalizes the submission of provisional ballots by citizens who have a good faith but mistaken belief that they are eligible to vote.

The intent of HAVA was to alleviate "a significant problem voters experience [, which] is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters." *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (citation omitted). Accordingly, "[t]he purpose of HAVA's provisional voting section is to ensure that voters are allowed to vote (and to have their votes counted) when they appear at the proper polling place and are otherwise eligible to vote." *Common Cause Georgia v. Kemp*, 347 F. Supp. 3d 1270, 1292 (N.D. Ga. 2018).

The Opinion misreads *Common Cause Georgia* and concludes that because HAVA exists for individuals who are "otherwise eligible to vote," criminalization of those who turn out to be ineligible does not conflict with HAVA. Op.29-30.

This interpretation directly conflicts with the text of HAVA, which contemplates both an unqualified right to submit a provisional ballot and that some individuals will be incorrect about their eligibility.

HAVA establishes a clear right to submit provisional ballots so long as an individual attests to her eligibility. The right to cast a provisional ballot under HAVA is "couched in mandatory terms" and "unambiguous." *Sandusky*, 387 F.3d at 572-73. HAVA provides that if an individual "declares" (1) "that such individual is a registered voter in the jurisdiction in which the individual desires to vote" and (2) "that the individual is eligible to vote in an election for Federal office," then the individual must be "permitted to cast a provisional ballot." 52 U.S.C. §21082(a). Critically, HAVA also contemplates that individuals may turn out to be incorrect regarding their eligibility to vote, and requires that states provide a mechanism for informing individuals that their ballots were not counted and the reasons why. 52 U.S.C. §21082(a)(5)(B). Nothing in HAVA contemplates criminal prosecution for those mistaken individuals.

The Opinion's interpretation also eviscerates the purpose of HAVA. HAVA exists because, in real time at the polling place, there is often ambiguity about whether someone is eligible to vote. *Sandusky*, 387 F.3d at 569-70. In light of that inevitable ambiguity, HAVA creates a right to cast a provisional ballot that assures that nobody is "turned away" from the polls. *Id.* at 576. Congress's intent was to

permit voters in Ms. Mason's situation to cast a provisional ballot, and have the State determine whether to count that ballot after the individual leaves the polling place: "Any error by the state authorities may be sorted out later, when the provisional ballot is examined [I]f the voter is not eligible, the vote will then not be counted." *Id*.

However, the Opinion's interpretation inverts this system and places tremendous risk on the prospective voter. Under the Opinion's reasoning, where ambiguity exists about a citizen's eligibility to vote, the citizen is forced to gamble with her liberty. She has a theoretical right to cast a provisional ballot, but if she is wrong about her eligibility, she could be subject to prosecution even if she acted in good faith. This eviscerates the right to cast a provisional ballot under HAVA and has a chilling effect on voting. The possibility of prosecution looming for a citizen casting a provisional ballot who may be mistaken about her eligibility would turn most away from the polls—including those who are correct about their eligibility.

The inability of the Opinion's view to coexist with the right to cast a provisional ballot mandated by HAVA is illustrated by the immense consequences it would have on Texas voters. The Opinion's interpretation would subject tens of thousands of Texans who erroneously submit provisional ballots to the possibility of felony prosecution. For example, during the 2016 Election, 44,046 provisional ballots in Texas were rejected because the individual was not registered in the

relevant precinct or subdivision. App'x.3. The rejections included individuals who moved but did not re-register, individuals who appeared at the wrong polling location, or individuals who had not timely registered. Since voting without registering and voting in an election outside the territory where a voter resides are violations of the Election Code, under the Opinion's interpretation, those individuals voted illegally and could face felony charges.

Conclusion

The Court should grant en banc reconsideration, vacate the Opinion, and order a judgment of acquittal.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), the undersigned counsel certifies that the total number

of words in Appellant's Motion for En Banc Reconsideration, exclusive of the

matters designated for omission, is 4,500 words as counted by Microsoft Word

Software.

/s/ Thomas Buser-Clancy

Thomas Buser-Clancy

CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify

that a true and correct copy of this Motion has been served on counsel of record via

e-service on June 1, 2020.

/s/ Thomas Buser-Clancy

Thomas Buser-Clancy

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APPENDIX

Texas Election Code § 64.012	App. 1
Delay v. State, 465 S.W.3d 232 (2014)	App. 2
Appellant's Post-Submission Letter	App. 3
Court of Appeals for the Second District of Texas,	
No. 02-18-00138-CR, Opinion	App. 4

APPENDIX 1

Vernon's Texas Statutes and Codes Annotated Election Code (Refs & Annos) Title 6. Conduct of Elections Chapter 64. Voting Procedures Subchapter A. Voting Generally

V.T.C.A., Election Code § 64.012

§ 64.012. Illegal Voting

Effective: December 1, 2017

Currentness

- (a) A person commits an offense if the person:
 - (1) votes or attempts to vote in an election in which the person knows the person is not eligible to vote;
 - (2) knowingly votes or attempts to vote more than once in an election;
 - (3) knowingly votes or attempts to vote a ballot belonging to another person, or by impersonating another person; or
 - (4) knowingly marks or attempts to mark any portion of another person's ballot without the consent of that person, or without specific direction from that person how to mark the ballot.
- (b) An offense under this section is a felony of the second degree unless the person is convicted of an attempt. In that case, the offense is a state jail felony.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1997, 75th Leg., ch. 864, § 63, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 393, § 3, eff. Sept. 1, 2003; Acts 2011, 82nd Leg., ch. 123 (S.B. 14), § 16, eff. Jan. 1, 2012; Acts 2017, 85th Leg., 1st C.S., ch. 1 (S.B. 5), § 1, eff. Dec. 1, 2017.

Notes of Decisions (41)

V. T. C. A., Election Code § 64.012, TX ELECTION § 64.012 Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

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APPENDIX 2

KeyCite Yellow Flag - Negative Treatment
Distinguished by Ex parte Perry, Tex.Crim.App., February 24, 2016
465 S.W.3d 232
Court of Criminal Appeals of Texas.

Thomas Dale DELAY, Appellant v.
The STATE of Texas.

No. PD-1465-13.

Synopsis

Background: Defendant, a former member of the United States House of Representatives, was convicted in the District Court, Travis County, 331st Judicial District, Wayne Patrick Priest, J., of money laundering of funds of \$100,000 or more, and conspiracy to commit money laundering. Defendant appealed. The Austin Court of Appeals, 410 S.W.3d 902, reversed. The State filed petition for discretionary review.

Holdings: The Court of Criminal Appeals, Price, J., held that:

- [1] evidence did not support finding that defendant was aware of any violation of Election Code in national political party's state elections committee's contribution of "hard money" to Texas candidates in exchange for defendant's political action committee's (PAC) otherwise innocuous agreement to send "soft money" to elections committee, and
- [2] evidence did not support a finding of any underlying violation of Election Code arising out of PAC's transferring \$190,000 from its corporate-donor derived "soft money" account to the soft money account of elections committee.

Affirmed.

Johnson, J., filed concurring opinion in which Cochran, J., joined.

Meyers, J., filed dissenting opinion.

West Headnotes (11)

[1] Criminal Law ← Construction of Evidence Criminal Law ← Verdict supported by evidence

In gauging the legal sufficiency of the evidence to support a particular criminal conviction, reviewing courts are obliged to view all of the evidence in the light most favorable to the jury's verdict, in deference to the jury's institutional prerogative to resolve all contested issues of fact and credibility; but sometimes appellate review of legal sufficiency involves simply construing the reach of the applicable penal provision in order to decide whether the evidence, even when viewed in the light most favorable to conviction, actually establishes a violation of the law.

13 Cases that cite this headnote

[2] Criminal Law 🕪 Weight and sufficiency

Appellate court measures the sufficiency of the evidence by the so-called hypothetically correct jury charge, one which accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant is tried.

14 Cases that cite this headnote

[3] Indictments and Charging Instruments • Mode or means of committing offense

When the indictment alleges only one of alternative statutory definitions or elements for how the offense occurred, the State must prove the alternative that it has pled, and proof of some other alternative will not save the conviction.

[4] Criminal Law • Weight and sufficiency

The hypothetically correct jury charge by which the sufficiency of the evidence is measured does not necessarily have to track exactly all of the charging instrument's allegations.

13 Cases that cite this headnote

[5] Conspiracy ← Particular crimes Currency Regulation ← Money laundering

To commit or conspire to commit money laundering, the actor must be aware of the fact that the transaction he conducts, supervises, or facilitates involves the proceeds of criminal activity. V.T.C.A., Penal Code § 34.02(a)(2).

[6] Election Law 🐎 Campaign Finance

While a non-party-affiliated general-purpose political action committee (PAC) would commit a felony by knowingly accepting a political contribution given with the intent that it be used in connection with a campaign, the Election Code does not make it an independent felony for the PAC, once it has illegally accepted such contributions, to then pass those contributions on to candidates. V.T.C.A., Election Code § 253.003(b).

[7] Conspiracy ← Particular Conspiracies Currency Regulation ← Money laundering Election Law ← Weight and Sufficiency

Evidence did not support finding that defendant, a former member of the United States House of Representatives, was aware of any violation of Election Code arising out of national political party's state elections committee's sending \$190,000 of its "hard money" to Texas candidates following election committee's earlier agreement with defendant's non-party-affiliated general-purpose political action committee (PAC) to exchange PAC's "soft money," derived from corporate donors, for elections committee's "hard money," and thus evidence did not support defendant's conviction for money laundering or conspiring to launder money; although soft money could not be used in connection with a campaign, soft money retained its character as soft money when received by elections

committee, contributions to Texas candidates came from account into which no corporate contributions had been deposited, neither the transfer of hard money or soft money by themselves violated Election Code, and no decisional law or other authority at that time had construed the Election Code so as to render such an agreed swap illegal under the Election Code. V.T.C.A., Election Code § 253.003(b); V.T.C.A., Penal Code § 34.02(a)(2).

[8] Currency Regulation • Money laundering

The federal money laundering statute requires knowledge that the funds defendant is purported to have laundered constitute ill-gotten gains; however, the actor need not know that trafficking in what he knows to be ill-gotten gains constitutes money laundering. 18 U.S.C.A. § 1956(a)(1).

[9] Conspiracy ← Particular Conspiracies Currency Regulation ← Money laundering Election Law ← Weight and Sufficiency

Evidence did not support a finding of any underlying violation of Election Code arising out of defendant's non-party-affiliated generalpurpose political action committee's (PAC) transferring \$190,000 from its corporate-donor derived "soft money" account to the soft money account of national political party's state elections committee following elections committee's earlier agreement with defendant's PAC to exchange elections committee's "hard money" for PAC's "soft money," and thus evidence did not support convictions for money laundering and conspiring to launder money obtained against defendant, a former member of the United States House of Representatives; no decisional law or other authority had construed the Election Code so as to render elections committee's and PAC's agreed swap illegal under the Election Code, and although PAC's fund-raising literature could have led corporate donors to improperly assume that their contributions would be steered toward campaigns of specific candidates, there was no evidence that corporate donors were cognizant of any illegality. V.T.C.A., Election Code § 253.003(b); V.T.C.A., Penal Code § 34.02(a)(2).

[10] Election Law - Campaign Finance

The two provisions in Election Code serving to criminalize unauthorized corporate political contributions were not intended to create separately actionable offenses, but rather identify only one third-degree felony offense.

V.T.C.A., Election Code §§ 253.003, 253.094.

1 Cases that cite this headnote

[11] Election Law 🖙 Campaign Finance

Provisions in Election Code criminalizing unauthorized corporate political contributions require proof that the actor was actually aware of the existence of the particular circumstance surrounding the political contribution that rendered it unlawful, and of the fact that undertaking such conduct under those circumstances in fact constituted a "violation of"

the Election Code. V.T.C.A., Election Code §§ 253.003, 253.094.

1 Cases that cite this headnote

Attorneys and Law Firms

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Holly Taylor, Assistant District Attorney, Austin, TX, Lisa C. McMinn, State's Attorney, Austin, for State.

OPINION

PRICE, J., delivered the opinion of the Court in which KELLER, P.J., and WOMACK, KEASLER, HERVEY, COCHRAN, and ALCALA, JJ., joined.

The appellant was convicted of the offenses of (1) money laundering of funds of an aggregate value of \$190,000, a firstdegree felony at the time, ¹ and (2) conspiracy to commit money laundering of the same aggregate amount, then a felony of the second degree. ² The trial court sentenced the appellant to five years' confinement for the object offense, although it suspended that sentence and placed the appellant on community supervision for a period of ten years. The trial court sentenced the appellant to three years' confinement for the conspiracy offense and did not suspend that sentence. On appeal, the Austin Court of Appeals reversed both convictions and rendered a judgment of acquittal with respect to each, having determined that the evidence was legally insufficient *235 to support them. ³ We granted the State's petition for discretionary review to examine its contention that the court of appeals failed to consider all of the evidence and failed to view the evidence it did consider with the proper respect for the jury's fact-finding function. We will affirm the court of appeals's judgment.

To be convicted of money laundering, the accused must be shown to have "knowingly ... conduct[ed], supervise[d], or facilitate[d] a transaction involving the proceeds of criminal activity[,]" and the crime that generated the proceeds must generally rise to the level of a felony. The appellant was convicted of having facilitated and conspired to facilitate the making of campaign contributions to certain Texas candidates with funds that were tainted because they were generated under circumstances that constituted a felony-grade violation of the Texas Election Code. The appellant has steadfastly insisted, both at trial and on appeal, that the funds were not tainted, for purposes of either money laundering or conspiracy to commit the same, because, as a matter of law, the circumstances under which the funds were generated did not violate any felony provision of the Election Code.

[1] It is axiomatic that, in gauging the legal sufficiency of the evidence to support a particular criminal conviction, reviewing courts are obliged to view all of the evidence in the light most favorable to the jury's verdict, in deference to the jury's institutional prerogative to resolve all contested issues of fact and credibility. ⁵ But sometimes appellate review of legal sufficiency involves simply construing the reach of the applicable penal provision in order to decide whether the

evidence, even when viewed in the light most favorable to conviction, actually establishes a violation of the law. ⁶ The court of appeals tacitly recognized this when it repeatedly alluded to our opinion in *Williams v. State*, in which we observed that, "[i]f the evidence establishes precisely what the State has alleged, but the acts that the State has alleged do not constitute a criminal offense under the totality of circumstances, then that evidence, as a matter of law, cannot support a conviction." We agree with the court of appeals's ultimate conclusion that, as a matter of law, what the State has proven in this case does not constitute either of the alleged criminal offenses.

I. BACKGROUND

A. The Facts

At the time he allegedly committed these offenses, in 2002, the appellant was the Republican Majority Whip of the United States House of Representatives. In *236 his capacity as Republican Majority Whip, the appellant established a congressional leadership federal political action committee called Americans for a Republican Majority ("ARMPAC"), 8 with Jim Ellis as its director. In a calculated effort to gain more Republican officeholders in the Texas House of Representatives during the 2002 election cycle, with the ultimate goal of obtaining redistricting in Texas so that more Republicans might gain seats from Texas in the United States House of Representatives, the appellant set in motion events that led to the formation of Texans for a Republican Majority ("TRMPAC"), a Texas general-purpose political committee, with Ellis's friend, John Colyandro, as its director. TRMPAC hired two fund-raisers: Susan Lilly, who specialized in raising political donations from individuals, and Warren RoBold, whose specialty was corporate fund-raising. TRMPAC generated fund-raising brochures, expressly identifying as its mission to "help Republican candidates successfully run and win campaigns in Texas" and assuring corporate donors that, "[u]nlike other organizations, your corporate contribution to TRMPAC will be put to productive use." Indeed, "[r]ather than just paying for overhead," corporations were told, "your support will fund a series of productive and innovative activities designed to increase our level of engagement in the political arena." Among those activities promised were "[a]ctive candidate evaluation and recruitment" and "[m]onitoring of campaign progress." One solicitation flier aimed at both individual and corporate donors specifically listed among TRMPAC's activities that it would "[f]ind the best candidates and help them win[,]" and, more pointedly, "[d]irect campaign contributions in targeted races." Another promised that "[y]our support today will go directly to help Republican candidates in Texas successfully run and win their campaigns." Yet another flier—this one actually returned to TRMPAC along with a \$5,000 corporate donation—directly asserted that "[a]ll contributions, whether to the PAC or individuals, will be used for direct campaign expenses." The appellant was listed as a member of TRMPAC's advisory board on most of this fund-raising literature, although the advisory board's function was largely ceremonial.

The record suggests that RoBold enjoyed greater success raising corporate contributions than Lilly did soliciting from individuals. By the middle of September of 2002, TRMPAC had raised more than \$350,000 in corporate contributions. Those funds were deposited in TRMPAC's so-called "soft money" account, out of which staff salaries and administrative expenses were regularly paid. TRMPAC also maintained a "hard money" account, into which it deposited contributions from individuals. In late August or early September of 2002, Ellis approached Terry Nelson, an officer with the Republican National State Election Committee ("RNSEC"), about the possibility of TRMPAC contributing soft money to RNSEC in exchange for RNSEC making contributions from its hard money account to Texas candidates. On September 13, 2002, Colyandro signed a blank check from TRMPAC's soft money account and forwarded it to Ellis in Washington, who then completed the check in the amount of \$190,000, payable to RNSEC. On receipt, RNSEC deposited the check into its own soft money account. A short time later, *237 TRMPAC provided RNSEC with a list of seven Republican candidates for the Texas House of Representatives and requested RNSEC to send specific amounts totaling \$190,000, and in early October, the RNSEC cut checks to the campaigns of those seven candidates from its hard money account. At trial, this process was characterized by both parties as a "money swap." There was some testimony that, because the uses to which individual political contributions can be put are more extensive than the permissible uses of corporate soft money, hard money is typically considered more valuable than soft, and that a "onefor-one" exchange of the type that TRMPAC negotiated with RNSEC was somewhat unusual. In any event, it is undisputed that RNSEC never transferred any money from its soft money account to its hard money account to cover the contributions it made to the seven Texas candidates.

Although the appellant did not testify at trial, certain statements he had made to the media over the years between the time of the indictment in 2005 and his trial in 2010 were introduced into evidence. Through those statements the appellant denied any direct participation in the money swap between TRMPAC and RNSEC, but he acknowledged that he was informed of the swap, and expressly approved of it, shortly after the fact. Indeed, it has been the consistent position of the defense throughout these proceedings that the swap was a perfectly legal exchange that did not violate the Texas Election Code. And indeed, the State does not seem to take issue with the appellant's assertions that neither TRMPAC's contribution of its excess soft money to RNSEC nor RNSEC's contributions to specific Texas candidates from its hard money account were unlawful in themselves. It was the State's principal theory at trial, nevertheless, that the prior agreement between TRMPAC and RNSEC to swap precisely \$190,000 of corporate contributions from TRMPAC's soft money account for that same amount of direct candidate contributions from RNSEC's hard money account violated the Election Code, thus generating criminal proceeds for purposes of money laundering. ⁹ Alternatively, on appeal and again in this Court, the State has argued that, even if the TRMPAC/RNSEC agreement did not render the \$190,000 "proceeds of criminal activity" for purposes of money laundering, the corporations that contributed the money to TRMPAC in the first place also violated the Election Code, rendering the swap between TRMPAC and RNSEC a transaction involving tainted funds.

In support of this latter, largely appellate theory, the State points to testimony that it elicited from executives of a dozen *238 corporations who described the circumstances under which they were solicited to make, and did make, the initial corporate political contributions to TRMPAC. One of those corporate executives maintained that his company had insisted in writing that their contributions be used for the administrative expenses of the general-purpose committee itself, and for no other purpose, in undoubted compliance with Texas law. 10 But RoBold confirmed that he did not expressly tell any of the corporate contributors that they must expressly designate their contributions for administrative uses only. Five of the corporate executives were never asked during trial whether they had expressly limited TRMPAC's use of their contributions to this purpose, though it is apparent from their demonstrated ignorance of Texas law with respect to the specific limitations on corporate contributions that they did not. 11 And six of the corporate executives expressly admitted on the stand that their corporate political contributions were not expressly limited in scope to the specific purpose of defraying TRMPAC's administrative costs. ¹² Most of them maintained, however, that they had trusted or assumed that their contributions would be put to a lawful purpose and/or that they had duly consulted with their corporate legal counsel, it never having been their *intention* to violate Texas law. ¹³

B. The Indictment

In a re-indictment, ¹⁴ the appellant was charged by separate counts with both the object offense of money laundering (Count II) and with conspiracy to commit money *239 laundering (Count I). In both counts, the proceeds of criminal activity that were claimed to have been laundered derived from alleged violations of Subchapter D of Chapter 253 of the Election Code, ¹⁵ which governs corporate political contributions.

In Count II, which set out the object offense of money laundering, ¹⁶ the indictment alleged two things of particular note. First, it expressly alleged that the particular transaction that constituted the money laundering was the transfer of \$190,000 from the RNSEC to the seven Texas candidates. Second, it expressly identified the event that rendered that \$190,000 the "proceeds of criminal activity" to be "a felony violation of Section 253.003 of the Election Code." and more specifically, "the offense of knowingly making a political contribution in violation of Subchapter D of the Texas Election Code[.]" ¹⁷ Count II did not specifically allege who knowingly made the political contribution that violated Subchapter D. It also did not allege, as an alternative theory of the offense, that the \$190,000 sent from RNSEC to the seven candidates also constituted the proceeds of criminal activity by virtue of the knowing acceptance (that is, by TRMPAC) of a political contribution in violation of Subchapter D. ¹⁸ Thus, Count II required the State to prove the underlying Election *240 Code violation by showing that someone knowingly made an unlawful political contribution under Section 253.003(a)—not that TRMPAC knowingly accepted one as proscribed by Section 253.003(b). 19

Count I, which alleged conspiracy to commit money laundering, ²⁰ was somewhat less specific with respect to the object offense, as conspiracy counts are wont to be. ²¹

Unlike Count II, Count I did not identify the particular money laundering transaction that the conspirators allegedly agreed to perpetrate. However, as with Count II, Count I also did not allege the alternative theory that the proceeds derived from criminal activity by virtue of the knowing *acceptance* of a political contribution in violation of Subchapter D of Chapter 253 of the Election Code. Thus, both counts required the State to prove the underlying Election Code violation by showing that someone knowingly *made* an unlawful political contribution under Section 253.003(a), not that TRMPAC knowingly *accepted* one as proscribed by Section 253.003(b).

C. The Appeal

The court of appeals panel, over the dissent of the Chief Justice, held that the evidence was insufficient to establish either count of the indictment. 22 The majority opinion began with the premise that sufficient proof with respect to both counts, including the conspiracy count, depended upon evidence "that there was a felony criminal offense which generated proceeds." *241 ²³ With respect to the State's trial theory that TRMPAC's agreement with RNSEC to swap soft corporate money for hard money sufficed to taint the money that RNSEC sent back to the candidates. the court of appeals rejected the State's argument that this exchange constituted a violation of the Election Code. ²⁴ Noting that it is legal for Texas corporations to make expenditures and contributions in connection with out-ofstate elections, the court of appeals found nothing illegal about TRMPAC's transfer of \$190,000 of corporate donations to RNSEC. 25 Nor did RNSEC violate the Election Code by sending \$190,000 from its own individual donor hard money account to Texas candidates. 26 Because no funds were transferred between RNSEC's two accounts, the money TRMPAC sent to RNSEC retained its character as soft corporate money, to be used for whatever legal purposes RNSEC deemed fit, while the money RNSEC sent from its hard money account to Texas candidates retained its character as individual donor money. 27 Moreover, even if the funds that TRMPAC sent to RNSEC were somehow tainted, the transaction by which RNSEC sent money to Texas candidates did not "involve" that tainted money, and therefore could not support money laundering (or even a conspiracy to commit money laundering). 28

Nor did the majority believe that the State proved, for purposes of either money laundering or conspiracy to commit money laundering, that RNSEC's transfer of funds involved criminally tainted proceeds by virtue of the initial corporate contributions made to TRMPAC. The court of appeals held that the State's evidence failed to show that the corporations harbored the requisite intent to violate Section 253.003(a) of the Election Code, "[g]iven the testimony of the corporate representatives [of the lack of any intent to violate Texas law] and the undisputed facts that the corporations could lawfully make donations to TRMPAC and TRMPAC could lawfully transfer the corporate funds out of state[.]" For this reason as well, the court of appeals held the evidence to

be insufficient to support a conviction for either the object

offense or the conspiracy offense.

Chief Justice Jones dissented. He opined that the jury had sufficient evidence, particularly in the form of TRMPAC's fund-raising literature, to infer that the corporate contributors were aware that TRMPAC intended to direct their contributions to candidates, in violation of Subchapter D of Chapter 253 of the Election Code. ³⁰ In a footnote, he expressed the additional view that the agreement between TRMPAC and RNSEC to swap soft money for hard money was also enough to demonstrate an Election Code violation, opining that "[s]uch conduct appears to be an attempt to circumvent, rather than comply with, Election Code restrictions on the use of corporate political contributions." ³¹ Particularly in view of this disagreement among the justices below, ³² we granted discretionary review.

*242 II. ANALYSIS

A. The Law: The Election Code and "Criminal Proceeds"

1. Definitions

A person commits money laundering if he "knowingly ... conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity [.]" ³³ A person commits criminal conspiracy if, with intent that a felony (here, money laundering) be committed, he agrees with one or more persons that they engage in conduct that would constitute that offense, and one of them performs an overt act in pursuit of that

agreement. ³⁴ "Criminal activity" for purposes of money laundering "means any offense, including any preparatory offense, that is ... classified as a felony under the laws of this state[.]" "Proceeds' means funds acquired or derived directly or indirectly from, produced through, or realized through an act." ³⁶ The criminal activity, the proceeds of which are said to have been involved in the transaction that the appellant conducted, supervised, or facilitated, was a purported felony-level violation (or violations) of the Texas Election Code.

Specifically, the proceeds are said to have been corporate political contributions made under circumstances that constituted a third-degree felony under the Election Code. Under Chapter 253, Subchapter D, Section 253.094 of the Election Code, "[a] corporation ... may not make a political contribution ... that is not authorized by this subchapter." ³⁷ Violation of this stricture is labeled "an offense" that is a "felony of the third degree." ³⁸ An illegal corporate political contribution is also a third-degree felony by virtue of Sections 253.003(a) and (e) of the Election Code, which provide that "[a] person may not knowingly make a political contribution in violation of" Chapter 253 of the Election Code, ³⁹ and that making such an illegal contribution "is a felony of the third degree if the contribution is made in violation of Subchapter D[,]" which covers Section 253.094's limitations on corporate political contributions. ⁴⁰ A corporation "may make *243 one or more political expenditures to finance the establishment or administration of a general-purpose committee." ⁴¹ A "political committee" is "a group of persons that has as a principal purpose accepting political contributions or making political expenditures[,]" while a "general-purpose committee" is a political committee "that has among its principal purposes[,]" inter alia, supporting or opposing unidentified candidates for public office. 42 A "political contribution" includes a "campaign contribution," which is defined, in turn, as "a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office[.]" 43 Finally, "'[c]ontribution' means a direct or indirect transfer of money, goods, or services, or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a transfer." 44

2. The State's Alternative Theories of "Criminal Proceeds"

In a nutshell, the Texas Election Code prohibits a corporation from making a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign. The State contends that the appellant committed money laundering, and conspired to commit money laundering, by facilitating a transaction involving funds that constituted criminal proceeds in that they were derived from felonious corporate political contributions.

The State proffers two theories for what rendered the corporate political contributions felonious. At trial, the State's theory was that the appellant's general-purpose political committee, TRMPAC, illegally agreed upon a scheme with RNSEC to route corporate political contributions indirectly to candidates, in violation of Sections 253,003(a), 253.094(a), and 253.100(a) of the Election Code, which together prohibit making corporate contributions to a general-purpose committee for any purpose other than the establishment and administrative expenses of that generalpurpose committee. 45 We shall call this the "agreement" theory of criminal proceeds. The State's second theory, stressed more on appeal than at trial, was that the corporate political contributions were illegal at their inception because they were made by the various corporate entities to TRMPAC, not as designated "political expenditure [s] to finance the establishment or administration of [that] general purpose committee[,]" *244 as permitted by the Election Code. 46 but instead, with the specific intent that they be put to impermissible use in connection with Texas campaigns. 47 We shall designate this the "corporation" theory of criminal proceeds. We shall determine whether the evidence is sufficient to support convictions under *either* theory.

[2] [3] [4] There is an additional wrinkle to iron out before we proceed: What are the theories of the money laundering "transaction" that are available to the State for sufficiency-of-the-evidence purposes? As we have already noted, Count I, which alleged conspiracy to commit money laundering, did not specify the particular transaction by which the State intended to prove the underlying object offense of money laundering. But Count II, which alleged the object offense, identified the transaction to be RNSEC's hard money contributions to the seven Texas candidates. Is the State

bound to this particular transaction, at least for purposes of proving the object offense of money laundering? It is arguable that sufficiency of the evidence should be measured against any non-statutory theory of "transaction" that the evidence would support, and not simply that which was alleged in the indictment. 48 Rather than definitively resolve that question today, we will simply assume arguendo that the evidence may also support the appellant's convictions based on the transaction by which TRMPAC conveyed money from its soft money account to RNSEC's soft money account, so long as the evidence establishes that this transaction was made with funds that were by that time already tainted by either of the State's theories of criminal proceeds—"agreement" or "corporate." Ultimately, we agree with the court of appeals that the appellant's convictions cannot stand because there is no possible view of the evidence that can establish that any transaction alleged to comprise money laundering involved the proceeds of a felony violation of the Texas Election Code, under either theory of criminal proceeds.

B. Transaction One: RNSEC's Contribution to Texas Candidates

1. The "Agreement" Theory of Criminal Proceeds

[5] laundering transaction is RNSEC's *245 hard money contributions to the seven Texas candidates, the question under the State's "agreement" theory is whether those funds constituted criminal proceeds by virtue of TRMPAC's earlier agreement with RNSEC to "swap" TRMPAC's soft money for RNSEC's hard money. In the State's view, this prior agreement itself constituted a felonious political contribution,

in contemplation of Sections 253.003(a) and (e) of the Election Code, because it was an "agreement" to make an "indirect transfer of money" "with the intent that it be used in connection with a campaign for elective office," under Sections 251.001(2), (3) and (5) of the Election

Code. ⁴⁹ Like the court of appeals, we disagree.

The State does not contend that the transfer of corporate contributions from TRMPAC's soft money account to RNSEC's soft money account was, in itself, a violation of the Election Code. 50 And it is uncontested that RNSEC, in turn, never transferred this corporate money from its soft money account into its individual hard money account. Nor

does the *246 State contend that the transfer of money from RNSEC's hard money account to the Texas candidates violated the Election Code. Presumably the State would agree that, had these transactions occurred serendipitously, without any prior collusion or plan on the part of TRMPAC and RNSEC—that is to say, had TRMPAC simply decided to send its excess corporate contributions (beyond what it needed to cover its own administrative expenses) to RNSEC, which enjoyed greater flexibility in their uses, and had RNSEC made a wholly independent determination that some of its hard money could best be put to use in the form of contributions to support specific Republican candidates in Texas—then there would be no identifiable violation of Subchapter D of Chapter 253 of the Election Code. Although the evidence is clear that there was an explicit agreement to "swap" TRMPAC's soft corporate money for RNSEC's hard money, we fail to perceive how such a prior agreement—even an agreement entailing identical amounts (the so-called "one-for-one" swap of \$190,000) and specifying particular candidates—could serve to transmute two transfers, neither of which by itself violates the Election Code, into a single transfer that does. In the absence of any transfer of corporate money from RNSEC's soft money account into its hard money account, the character of the monies never changed; it cannot be said that the Texas candidates ever received corporate contributions, even indirectly. Therefore, we agree with the court of appeals that the agreement between TRMPAC and RNSEC did not Presupposing that the relevant money violate Subchapter D of Chapter 253 of the Election Code.

> Moreover, even were we to disagree with the court of appeals and hold that the prior agreement could somehow operate to change the character of the \$190,000 that RNSEC sent to the Texas candidates from hard money into corporate soft money, we still could not conclude that the evidence would suffice to establish money laundering. The reason is fairly simple: There is nothing in the record to show that the appellant knew that he was conducting, supervising, or facilitating a transaction that involved the proceeds of criminal activity. The State has failed to establish the requisite culpable mental state to prove the offenses of money laundering and conspiracy to commit money laundering.

[8] A person commits money laundering if he "knowingly ... conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity[.]" 51 From a grammatical standpoint, this statutory language is patently ambiguous. Is it enough that the person knowingly conducts, supervises, or facilitates a transaction? Or must he also be "aware" of the added circumstance surrounding that conduct that makes

it unlawful, namely, that the transaction he is conducting, supervising, or facilitating involves the proceeds of criminal activity? 52 How much of the ensuing statutory language is the adverb "knowingly" intended to modify? As in other instances of statutory construction in the face of this sort of grammatical uncertainty, the question boils down to "how far down the sentence" the Legislature intended for the mens rea requirement of knowledge "to travel." ⁵³ We think the Legislature *247 must surely have intended that, to commit or conspire to commit money laundering, the actor must be aware of the fact that the transaction involves the proceeds of criminal activity. Otherwise, the statute would attach a mens rea to nothing more than conduct conducting, supervising, or facilitating a transaction—that is not intrinsically blameworthy. As in McQueen v. State, "[w]hat makes the conduct unlawful is that it is done under certain circumstances," and, in the face of a statute that is ambiguous with respect to the extent of the mens rea requirement, we have resolved the ambiguity in favor of applying "some form of culpability ... to those 'conduct elements' which make the overall conduct criminal." 54 That is how the ambiguity in Section 34.02(a)(2) must be resolved. 55

There is no evidence in the record from which it may fairly be inferred that the appellant was aware that, by agreeing beforehand to send \$190,000 of soft money to RNSEC in exchange for RNSEC sending \$190,000 of its hard money to the Texas candidates, TRMPAC had committed a violation of the Election Code. Indeed, the evidence suggests that the appellant, to the extent that he was personally involved in the agreement at all, believed that, so long as the soft money retained its character as soft money and the contributions from RNSEC to the Texas candidates came from an account into which no corporate contributions had been deposited, the agreed-to swap would not run afoul of the Election Code. In the absence of some decisional law or other authority in Texas at that time that had construed the Election *248 Code so as to render such an agreed swap illegal under the Election Code, it cannot reasonably be concluded that the appellant was, or even could have been, aware that the transaction whereby RNSEC contributed hard money to the seven Texas candidates involved the proceeds of criminal activity. That being so, he simply was not susceptible to conviction for laundering money or conspiring to launder money. ⁵⁶

2. The "Corporation" Theory of Criminal Proceeds

Continuing to entertain the presupposition that the relevant money laundering transaction is, as alleged in Count II of the indictment, RNSEC's hard money contributions to the seven Texas candidates, the evidence cannot support the appellant's convictions under the State's "corporation" theory for the same reasons that the evidence cannot support prosecuting the appellant under the State's "agreement" theory. Because this transaction did not involve the corporate contributions originally made to TRMPAC (and because the appellant was not aware, in any event, that the transaction did involve corporate contributions on account of the agreement to swap TRMPAC corporate contributions for RNSEC hard money), it is inconsequential to the sufficiency analyses whether those corporate contributions were made to TRMPAC in violation

of Section 253.003(a) and Subchapter D of Chapter 253 of the Election Code. The transactions from RNSEC to the seven Texas candidates did not involve those corporate contributions. Thus, the evidence fails to establish that the transaction from RNSEC to the seven Texas candidates constituted money laundering or conspiracy under either the "agreement" or "corporation" theory of criminal proceeds.

C. Transaction Two: TRMPAC's Contribution to RNSEC

[9] Changing our focus to TRMPAC's transfer by check of the \$190,000 from its soft money account to RNSEC's soft money account as the relevant money laundering event, we must still conclude that the evidence was insufficient. It is true that, unlike the transfers from RNSEC's hard money account to the seven Texas candidates, this earlier transaction *did* involve *249 corporate political contributions that had been deposited into TRMPAC's soft money account. If these contributions were tainted because illegally made at the time TRMPAC forwarded them to RNSEC, then the jury may yet have had a rational basis to convict the appellant. For the reasons that follow, however, we ultimately reject the conclusion that the transfer from TRMPAC to RNSEC involved tainted proceeds.

1. The "Agreement" Theory of Criminal Proceeds

The agreement between TRMPAC and RNSEC was already in existence by the time the transaction occurred by which TRMPAC transferred \$190,000 from its soft money account to RNSEC's soft money account. But, for the reasons we have already explained at length, that agreement did not contemplate a transaction involving corporate contributions at all, much less an illegal transfer of corporate contributions, since the agreement was for RNSEC to make the contributions to the Texas candidates from its hard money account. The proceeds were not criminally tainted on account of such an agreement. Therefore, conviction cannot be sustained predicated on TRMPAC's transfer of the money to RNSEC as the money laundering event based on the State's agreement theory of criminal proceeds. But the proceeds may yet have been tainted by the time that transaction occurred if the corporate contributions were illegally made at their inception, and we turn finally to that question.

2. The "Corporation" Theory of Criminal Proceeds

[11] As we have already observed, there are actually two provisions in the Election Code that serve to criminalize unauthorized corporate political contributions. On the one hand, Section 253.094(a) prohibits political contributions by corporations that are "not authorized by" Subchapter D of Chapter 253, with Section 253.094(c) designating such an offense a third-degree felony. 57 While Section 253.094 identifies no culpable mental state, neither does it plainly dispense with one. Under Section 6.02(b) and (c) of the Texas Penal Code, applicable to offenses defined outside of the Penal Code by virtue of Section 1.03(b), "intent, knowledge, or recklessness suffices to establish criminal responsibility." ⁵⁸ On the other hand, a "person," including a corporation, ⁵⁹ also commits the same level of felony (third degree) if he "knowingly" makes a political contribution that violates Subchapter D of Chapter 253, under Sections 253.003(a) and (e) of the Election Code. We do not think that the legislature intended to create separately actionable offenses under Sections 253.094 and 253.003 of the Election Code. After all, it makes little sense to prohibit identical conduct in separate statutory provisions that carry an identical range of punishment, one of which fails to specify any culpable mental state at all but for which a culpable state is nevertheless required *250 (and for which mere recklessness will suffice), while the other must

be committed at least knowingly. The provision requiring knowledge would be rendered essentially superfluous under this state of affairs, which means the Legislature would have accomplished a useless thing, contrary to our usual interpretive assumption. To avoid this result, we shall read the two provisions *in pari materia*, entertaining the "supposition that several statutes relating to one subject are governed by one spirit and policy, and are intended to be consistent and harmonious in their several parts and provisions." Accordingly, we conclude that the Legislature must have intended to identify only one third-degree felony offense of making a corporate contribution in violation of Subchapter D of Chapter 253 of the Election Code, and that, moreover, it must have intended that such an offense be committed knowingly.

Here again, however, we are confronted with a statutory provision for which it is "not at all clear how far down the sentence the word 'knowingly' is intended to travel[.]" ⁶² As with the money laundering statute, we conclude that the Legislature intended that conviction should depend upon proof of more than just the bare conduct ("make a political contribution"), which (while it may be subject to state regulation, within First Amendment boundaries) is not intrinsically condemnable. We hold that the State must also show that the actor was actually aware of the existence of the particular circumstance surrounding that conduct that renders

it unlawful. Moreover, as written, Section 253.003(a) requires that the actor be aware, not just of the particular circumstances that render his otherwise-innocuous conduct unlawful, but also of the fact that undertaking the conduct under those circumstances in fact constitutes a "violation of" the Election Code. 63

We are keenly aware that the Texas Supreme Court has construed a similarly worded provision of the Election Code differently. In *Osterberg v. Peca*, ⁶⁴ our sister Court was called upon to interpret Section 253.131(a), authorizing civil damages for the making of campaign contributions and expenditures that violate Chapter 253. ⁶⁵ There, as here, the question was whether the word "knowingly" in the statute modified merely the making of a campaign contribution, or whether it also modified the statutory circumstance that the contribution was made "in violation of" the Election Code. ⁶⁶ The majority concluded that "knowingly" should be read to modify only *251 the conduct, not the attendant circumstance, pointing to language

from other Election Code provisions, including Section 253.003(b), ⁶⁷ that are more explicit in assigning a mens rea to the circumstance surrounding conduct, as an indication of such a legislative intent. ⁶⁸ Here, however, we are construing a criminal provision, not a civil one. Moreover, it is a penal provision that appears outside of the Penal Code itself, and in construing penal provisions that appear outside the Penal Code, we have recognized that the rule of lenity applies, ⁶⁹ requiring "that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 70 And indeed, even when construing provisions within the Penal Code, we have typically resolved ambiguities with respect to the scope of the applicable mens rea in favor of making sure that mental culpability extends to the particular circumstance that renders otherwise innocuous conduct criminal.⁷¹ That the Legislature may have more explicitly assigned mental culpability to attendant circumstances in neighboring statutory provisions does not eliminate the patent ambiguity from Section 253.003(a) itself. Nor does it absolve us of the duty to ascribe a culpable mental state to the particular "statutory elements that criminalize otherwise innocent conduct." 72

The State is correct to contend that there is evidence in the record from which the jury could rationally have inferred that the corporations that contributed to TRMPAC were aware that TRMPAC was determined to find a way to steer those contributions to the campaign coffers of specific candidates. The fund-raising literature at the very least encouraged the corporations to assume as much, and there was some testimony suggesting that RoBold, TRMPAC's corporate fund-raiser, may have not have disabused them of this notion, notwithstanding his denials. ⁷³ But *252 nothing in the record shows that anyone associated with the contributing corporations actually realized that to make a political contribution under these circumstances would in fact violate

Section 253.003(a) (or any other provision) of the Texas Election Code. Only one of the testifying corporate executives evinced any such knowledge, and he represented one of the corporations, Philip Morris, that expressly designated that its contributions be put exclusively to the purpose of administering TRMPAC itself, so that its contribution was lawfully made. Every corporate executive who was specifically asked vehemently denied any intention to violate Texas law, ⁷⁴ and the State produced no evidence that any of them was actually cognizant of any illegality. The State

argues that the jury was entitled to discredit these corporate disavowals of illegal intent. That may be the case, but there remains an utter lack of circumstantial evidence—evidence, for example, of covert dealings or the wholesale failure to vet the contributions through in-house corporate counsel from which a jury might rationally infer corporate knowledge of actual unlawfulness. While the corporate contributors may have had enough information about TRMPAC's apparent intentions from the fund-raising literature that they were, or ought to have been, aware of a substantial and unjustifiable risk that their corporate contributions would violate the Texas Election Code, ⁷⁵ neither recklessness nor negligence serves to establish an offense under Section 253.003(a). On this state of the record, we cannot conclude that, at the time that TRMPAC transferred those corporate contributions from its soft money account to RNSEC's soft money account, the contributions were tainted because the corporations had made them with the awareness that to do so under the circumstances constituted a violation of Chapter 253.003(a) of the Election Code. Because the State has failed to prove that the corporate contributors harbored the requisite mens rea to establish an offense under the Election Code, we agree with the court of appeals that it has not established that the *253 money conveyed by TRMPAC to RNSEC constituted the proceeds of criminal activity for purposes of money laundering or conspiracy to commit money laundering.

III. CONCLUSION

For these reasons, we agree with the court of appeals that, as a matter of law, the State failed to prove facts to establish that the appellant committed either the object offense of money laundering or the inchoate offense of conspiracy to commit the same. Accordingly, we affirm the judgment of the court of appeals.

JOHNSON, J., filed a concurring opinion in which COCHRAN, J., joined.

MEYERS, J., filed a dissenting opinion.

JOHNSON, J., filed a concurring opinion in which COCHRAN, J., joined.

As I read the indictment against appellant, he was charged in count I with conspiring with his co-defendants to "knowingly mak[e] a political contribution" in violation of the Election

Code. Count II alleged that he "did knowingly conduct, supervise, and facilitate a transaction involving the proceeds of criminal activity ... to wit, ... knowingly making a political contribution" in violation of the Election Code. Thus the state had to prove for count II that the contribution made by TRMPAC to RNSEC violated the Election Code, that appellant was active in the process, and that he knew that the process violated the Election Code. If the contribution did not violate the Election Code, count II failed, as did count I because it is not a crime to conspire to do a legal act.

There is some evidence that appellant was aware of the transfer—knowledge claimed to be acquired after the fact—but none that he was directly involved. The soft money from TRMPAC went into RNSEC's soft-money account. Because it came from TRMPAC's soft-money account and went into RNSEC's soft-money account, the beliefs and intents of the corporate executives became irrelevant; corporate money, regardless of the donor's actual intent, went into the corporate-money account. The money sent by RNSEC directly to Texas candidates came, as is required by law, from its hard-money account. Like some of Goldman Sachs's dealings with a Spanish bank, the wheeling and dealing was a tad shady, but legal.

MEYERS, J., filed a dissenting opinion.

You can always tell when an opinion is written with the outcome decided before any legal analysis is done because it reads like a medical report written by a doctor who has never conducted a physical examination of the patient. This is precisely how the court of appeals' opinion in this case comes across. The court of appeals concluded the evidence to be insufficient to sustain Appellant's conviction but directly misapplied the sufficiency of the evidence standards. *See DeLay v. State*, 410 S.W.3d 902 (Tex.App.—Austin 2013, pet. granted). In his dissent, Justice Jones aptly points out all of the correct criteria for sufficiency that was completely ignored by the majority. *Id.* at 917–19 (Jones, J., dissenting). Due to this misdiagnosis by the court of appeals, the State had to file a petition for discretionary review in our Court.

At oral argument before our Court, the State presented an accurate and clear rendition of how the sufficiency analysis should have been conducted in this case and how it would have indicated that Appellant's conviction was proper. Soon thereafter, however, counsel for Appellant was quick to set this court straight on what we really needed to do, stating:

*254 There is a fine line between prosecution and persecution that was crossed, and has been crossed, and continues to be crossed over the past decade when a prosecutorial posse essentially does what it has to do to manufacture an illegal act out of a series of legal ones ... When the third court shut the State down last September, in an equally bankrupt maneuver, concluding that the evidence was legally insufficient that Tom DeLay was guilty of money laundering and conspiracy. And when this Court does what the law requires, to affirm the ultimate decision of the third court of appeals, it will do what needs to be done. And that is to shut down, once and for all, this decade long quest of manufacturing an illegal act out of a series of legal ones.

Based upon these marching orders, the majority has followed Appellant's instructions and crafted an opinion which is just as deficient in its analysis as the one from the court of appeals.

The majority in this case has changed the law and ignored the facts in order to arrive at a desired outcome, as it has done before. See Baird v. State. 398 S.W.3d 220 (Tex.Crim.App.2013) 1; Wehrenberg v. State, 416 S.W.3d 458 (Tex.Crim.App.2013)². To hold, for the first time, that Section 253.003(a) of the Election Code requires the actor to be aware that his actions constitute a violation of the Texas Election Code completely neuters this crime. It places a burden on the State that is impossible to overcome. How does the State gather enough evidence to prove that the corporation knew the actions violated the Election Code? What constitutes enough evidence to show knowledge? Which person in the corporation will be charged with the knowledge of the entire corporation? In addition to placing this ridiculous burden on the State, which effectively repeals the statute, this holding also allows corporations who simply cannot be bothered to look up the law to get away with making illegal contributions.

When faced with a similar question in Osterberg v. Peca,

12 S.W.3d 31 (Tex.2000), the Texas Supreme Court came out on the other side, holding that "knowingly" modified only the conduct of the offense rather than the attendant circumstance, as the majority should have held here. In fact, even though the burden in its civil cases is far less than "beyond a reasonable doubt," the Texas Supreme Court still did not believe that knowledge of illegality was an element of the offense.

Further, it should be noted that Section 253.003(b), the provision that immediately follows the one at question here, states that "A person may not knowingly accept a political contribution the person knows to have been made in violation of this chapter." There, the Legislature specifically identifies that the actor must know of the illegality. In the provision that immediately precedes it, however, the Legislature makes no such clarification. If the Legislature intended what the majority now holds, it would have worded the provision in the same way it did Section 253.003(b): a person may not

the same way it did Section 253.003(b): a person may not knowingly make a political contribution the person knows to be in violation of this chapter. The reality here is that the majority is eager to keep Appellant from *255 going to prison, and, as a result, it has done one better than what the appellant's attorney even asked for.

When you consider the elements of this crime as they should be, without the new addition of knowledge of illegality, the State presented sufficient evidence to support the conviction. Given that the evidence presented indicates that TRMPAC conveyed to the corporations that their donations would be used for individual campaigns, a rational juror could have concluded that the corporations made the donations with the intent that the money go to candidates. This means that the jury could rationally decide that the initial donations violated the law and were, therefore, proceeds of criminal activity.

Although the majority agrees that there was evidence that the corporations knew the donations would go to candidates, it concludes that this is not enough to affirm the conviction because the State also needed to prove the corporations actually knew their contributions would violate the Texas Election Code. This holding is incorrect, and in crafting an opinion to suit only the majority's desired outcome for this case, it has changed the law, which leaves unfortunate and lasting effects on our jurisprudence, as is illustrated by Baird and Wehrenberg. The result of this particular case is that a corporation may now make election donations with immunity, since the State would never be able to prove it did not actually know the contribution violated the law. Because I would hold that knowledge of illegality is not an element of the crime, and that a rational jury could have found the essential elements of the crime charged beyond a reasonable doubt, as the rational jury in the case did, I respectfully dissent.

All Citations

465 S.W.3d 232

Footnotes

- TEX. PENAL CODE § 34.02(a)(2), (e). The offense is alleged to have occurred in 2002, at which time it was a first-degree felony to launder money of an aggregate value greater than \$100,000. The money laundering statute has since been amended to raise the threshold value for a first-degree felony to \$200,000. Acts 2005, 79th Leg., ch. 1162, § 2, p. 3803, eff. Sept. 1, 2005. All citations are to the provisions of the Texas Penal Code and Texas Election Code as they existed in 2002.
- TEX. PENAL CODE § 15.02(a), (d). Such an offense would have been a second-degree felony in 2002, since the object offense of money laundering was a first-degree felony at that time.
- 3 DeLay v. State, 410 S.W.3d 902 (Tex.App.–Austin 2013).
- 4 See TEX. PENAL CODE § 34.02(a)(2); id. § 34.01(1)(A). "Criminal activity" may also include an offense punishable by confinement for more than one year under the laws of another state. Id. § 34.01(1)(B). That provision is not applicable in this case.
- ⁵ E.g., Brooks v. State, 323 S.W.3d 893, 899 & n. 13 (Tex.Crim.App.2010).
- 6 See, e.g., Shipp v. State, 331 S.W.3d 433 (Tex.Crim.App.2011) (plurality opinion) (holding that a retail store's printed receipt falls within the catch-all of "another commercial instrument" in contemplation of the forgery statute and that the evidence was therefore sufficient to support a conviction for passing a forged store

receipt); Wright v. State, 201 S.W.3d 765 (Tex.Crim.App.2006) (construing a statutory provision to hold that unusable toxic substances may be included to obtain a sufficient aggregate weight of methamphetamine to sustain the conviction).

- 7 DeLay, 410 S.W.3d at 907, 915, 916 (citing Williams v. State, 235 S.W.3d 742, 750 (Tex.Crim.App.2007)).
- Testimony showed that "[a] leadership PAC is a Political Action Committee that many of the members of Congress ... have" whereby "the monies that they are able to raise and put in their PACs, they can use to help other like-minded politicians across the country get elected[.]"
- 9 In its opening remarks during the final guilt-phase summations, the State argued:

The moment, the moment that the decision was made to send the soft dollar check up to Washington, D.C. with the intent that it ultimately go to candidates for elective office is the moment that this money became proceeds of criminal activity, specifically, a third-degree felony.

* * *

This agreement, this—this agreement with the names of the candidates and the corresponding amounts is what separates this transaction from any other swap that anyone else in the [sic] history has done. It is this agreement that makes it money laundering.

In its brief on discretionary review, as in its brief on appeal, the State has consistently characterized the agreement as an "exchange" whereby TRMPAC used soft corporate contributions to "purchase" hard money from RNSEC for use by candidates. State's Brief on the Merits at 25, 43, 45; State's Brief on Direct Appeal at 170. The State employed similar terminology during its oral argument to this Court.

- Philip Morris Companies, Inc., contributed \$25,000, along with a cover letter designating that this contribution must be used by TRMPAC exclusively to help cover its administrative expenses. TRMPAC's accountant testified that another corporate donor, Lexmark International, Inc., also expressly designated that its \$5,000 corporate contribution could only be put to the purpose of defraying TRMPAC's administrative costs.
- El Paso Energy Services Company, Cornell Companies, Bacardi U.S.A., Inc., Cracker Barrel, and Reliant Energy made contributions of \$50,000, \$10,000, \$20,000, \$25,000, and \$25,000, respectively. Both Cracker Barrel's and Reliant Energy's contributions were not deposited into TRMPAC's soft money account until October 1, 2002, several weeks after Colyandro had forwarded the blank check from that account to Ellis to hand over to RNSEC.
- Five companies made corporate contributions without specifying a particular use for which they must be put: Questerra Corporation (\$50,000), Westar Energy (\$25,000), Diversified Collection Services, Inc. (\$50,000), Sears Roebuck and Co. (\$25,000), and The Williams Companies, Inc. (\$25,000).
- During trial, the prosecutor asserted that at least two of the corporations eventually signed diversion agreements with the Travis County District Attorney in order to avoid prosecution in which, the prosecutor claimed, they did admit to some wrongdoing. The defense hotly contested these assertions. The record shows that Sears and Roebuck, Inc., as part of an agreement with the district attorney's office whereby the indictment against it was dismissed, asserted that it had not intended to violate Texas law. According to the prosecutor, Cracker Barrel also "signed a pretrial diversion agreement accepting responsibility for having made a mistake[,]" although Cracker Barrel's legal department had vetted TRMPAC's solicitation and approved the contribution, having perceived no legal impediment at the time.
- The original indictment also charged the appellant with conspiracy to violate the Texas Election Code. This Court ultimately sustained the trial court's ruling "to quash the Election Code-based conspiracy charges" on the basis of our holding that Section 15.01 of the Texas Penal Code, the criminal conspiracy provision, did not apply to offenses defined in the Election Code until legislative amendment in 2003. State v. Colyandro, 233 S.W.3d 870, 885 (Tex.Crim.App.2007); TEX. PENAL CODE § 15.01. See note 45, post.
- 15 TEX. ELEC.CODE ch. 253, subch. D.
- 16 Count II of the indictment (money laundering) alleged that the appellant:
 did knowingly conduct, supervise, and facilitate a transaction involving the proceeds of criminal activity that
 constituted an offense classified as a felony under the laws of this state, to wit, the offense of knowingly

making a political contribution in violation of Subchapter D of Chapter 253 of the Texas Election Code, a felony violation of Section 253.003 of the Election Code; that the aforesaid transaction consisted of the transfer of funds of the aggregate value of \$190,000 from the Republican National Committee and the Republican National State Election Committee, a nonfederal component and account of the Republican National Committee, to several candidates for the Texas House of Representatives that were supported by Texans for a Republican Majority PAC, namely, Todd Baxter, Dwayne Bohac, Glenda Dawson, Dan Flynn, Rick Green, Jack Stick, and Larry Taylor; that the defendants conducted, supervised, and facilitated the aforesaid transaction by:

- (1) negotiating with Terry Nelson, deputy chief of staff of the Republican National Committee, for an agreement, arrangement, and understanding whereby Texans for a Republican Majority PAC would make a contribution of a certain sum of money to the Republican National Committee and its nonfederal component and account, the Republican National State Elections Committee, and whereby the Republican National Committee and the Republican National State Elections Committee would make contributions to the aforesaid candidates;
- (2) providing the said Terry Nelson with certain information concerning contributions to be made by the Republican National Committee and the Republican National State Elections Committee to the said candidates, to wit, the names of the said candidates and amounts that Texans for a Republican Majority PAC suggested be contributed to each of the said candidates;
- (3) signing the check reproduced at the conclusion of this count; and
- (4) transferring funds of the value of \$190,000 from Texans for a Republican Majority PAC to the Republican National Committee and the Republican National State Elections Committee;

and that the value of the funds that constituted the aforesaid proceeds of criminal activity was \$100,000 or more.

- Emphasis added. See TEX. ELEC.CODE § 253.003(a) ("A person may not knowingly make a political contribution in violation of this chapter."); id. § 253.003(e) ("A violation of Subsection (a) ... is a felony of the third degree if the contribution is made in violation of Subchapter D.").
- See id. § 253.003(b) ("A person may not knowingly accept a political contribution the person knows to have been made in violation of this chapter."); id. § 253.003(e) ("A violation of Subsection ... (b) is a felony of the third degree if the contribution is made in violation of Subchapter D.").
- See Curry v. State, 30 S.W.3d 394, 404–05 (Tex.Crim.App.2000) (when the indictment alleges a few, but not all, of the alternative statutory manner and means of committing the offense, the hypothetically correct jury charge against which the sufficiency of the evidence will be measured is limited to only those statutory theories alleged, and evidence of other statutory alternatives will not satisfy the State's burden of proof);
 - Geick v. State, 349 S.W.3d 542, 547–48 (Tex.Crim.App.2011) (when pled, a statutory definition becomes an element of the offense that the State must prove).
- 20 Count I of the indictment (conspiracy) alleged that the appellant:
 - with intent that a felony be committed, to wit, with intent that the offense of knowingly making a political contribution to a candidate for the Texas House of Representatives in violation of Subchapter D of Chapter 253 of the Texas Election Code, a felony of the third degree, be committed, and with intent that the offense of money laundering of funds of the value of \$100,000 or more, a felony of the first degree, be committed, did agree with one or more persons, namely, John Dominick Colyandro, also known as "John Colyandro," James Walter Ellis, also known as "Jim Ellis," Thomas Dale DeLay, also known as "Tom DeLay," Texans for a Republican Majority PAC, also known as "TRMPAC," and the Republican National Committee, also known as "the RNC," that they or one or more of them engage in conduct that would constitute the aforesaid offense, and the defendant, John Dominick Colyandro, the defendant, James Walter Ellis, and the Republican National Committee, did perform an overt act in pursuance of the agreement, to wit: [a lengthy

list of overt acts by which TRMPAC sent the check to RNSEC in exchange for particular contributions for the seven named Texas candidates, as paraphrased by the court of appeals, see *DeLay*, 410 S.W.3d at 908].

- See, e.g., Farrington v. State, 489 S.W.2d 607, 609 (Tex.Crim.App.1973) ("An indictment charging a conspiracy to commit a felony need not allege the offense intended with the particularity necessary in an indictment charging the commission of the intended offense."); Smith v. State, 781 S.W.2d 418, 420 (Tex.App.-Houston [1st Dist.] 1989, no pet.) (applying the holding of Farrington to an indictment under the current penal code).
- 22 DeLay, 410 S.W.3d at 916.
- 23 Id. at 909.
- 24 *ld.* at 912–13
- 25 *Id.* at 913.
- 26 Id.
- 27 Id.
- 28 *Id.* at 914–15.
- 29 *Id.* at 911.
- 30 *Id.* at 916–19.
- 31 *Id.* at 919 n. 3.
- 32 TEX.R.APP. P. 66.3(e).
- 33 TEX. PENAL CODE § 34.02(a)(2).
- 34 *Id.* § 15.02(a).
- 35 *Id.* § 34.01(1)(A).
- 36 *Id.* § 34.01(4).
- 37 TEX. ELEC.CODE § 253.094(a).
- 38 Id. § 253.094(c).
- The general definitions in the Texas Penal Code apply to penal provisions outside the Penal Code. TEX. PENAL CODE § 1.03(b). Under Section 1.07(38) of the Penal Code, "person" includes a corporation. *Id.* § 1.07(38). Moreover, reading the various provisions of Chapter 253 of the Election Code together makes it evident that "person" was meant to embrace corporations. *See, e.g., former* TEX. ELEC.CODE § 253.002 (repealed by Acts 2011, 82nd Leg., ch. 1009, § 6(1), p. 2557, eff. June 17, 2011) (prohibiting "a person" from knowingly making a direct campaign expenditure, but then excepting "a corporation" from this prohibition under certain circumstances). Indeed, if the Legislature did not intend for corporations to count as "persons"

for purposes of Section 253.003(a), it would not have included subsection (e), making it a felony-grade offense if the "person" violates Subchapter D of Chapter 253, governing corporations and labor organizations.

- TEX. ELEC.CODE § 253.003(e).
- TEX. ELEC.CODE § 253.003(a), (e). It is also an offense for a person to "knowingly accept" an illegal campaign contribution, under Section 253.003(b) of the Election Code. See id. § 253.003(b) ("A person may not knowingly accept a political contribution the person knows to have been made in violation of this chapter."). As we have already observed, however, this theory of how the corporate political contributions may have constituted the "proceeds of criminal activity" for purposes of money laundering and conspiracy to commit money laundering was not alleged in the indictment. We express no opinion regarding this theory since it is not before us.
- 41 Id. § 253.100(a) (emphasis added). An "expenditure" is defined as "a payment of money or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a payment." Id. § 251.001(6).
- 42 *Id.* § 251.001(12), (14).
- 43 *Id.* § 251.001(5), (3).
- 44 Id. § 251.001(2).

- **Id. §§ 253.003(a), *** 253.094(a), 253.100(a), *** 251.001(2), *** (3), *** (5). This Court held, in **Colyandro*, 233 S.W.3d at 885, that, at least as of 2002, Section 15.01 of the Texas Penal Code, the criminal conspiracy provision, did not apply to offenses defined in the Election Code-although the Legislature changed that by amendment to the Election Code in 2003. See Acts 2003, 78th Leg., ch. 393, § 2, p. 1633, eff. Sept. 1, 2003; see also note 14, ante. The State focuses on the definition in Section 251.001(2) of "contribution," which includes an "agreement ... to make a transfer[,]" **TEX. ELEC.CODE § 251.001(2), to argue that the appellant violated the Election Code regardless of the applicability of Section 15.01 of the Penal Code to the Election Code.
- TEX. ELEC.CODE § 253.100(a). See Ex parte Ellis, 309 S.W.3d 71, 88 (Tex.Crim.App.2010) ("[I]t is ... clear that [Section] 253.100 contemplates expenditures made by a corporation for certain purposes. A contribution with no strings attached would not qualify as such an expenditure. * * * [T]here is no such thing as a legal undesignated corporate political contribution."); TEX. ETHICS COMM'N OP. No. 132, at 2 (1993) ("[T]he corporation may make a contribution of money to the general-purpose committee, with the restriction that it be used only for permissible purposes under section 253.100.").
- 47 TEX. ELEC.CODE §§ 251.001(3), 253.094(a), 253.003(a).
- We measure the sufficiency of the evidence by the so-called hypothetically correct jury charge, one which accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant is tried. Malik v. State, 953 S.W.2d 234, 240 (Tex.Crim.App.1997). When the indictment alleges only one of alternative statutory definitions or elements for how the offense occurred, the State must prove the alternative that it has pled, and proof of some other alternative will not save the conviction. Johnson v. State, 364 S.W.3d 292, 294 n. 10 (Tex.Crim.App.2012). "[B]ut we have said also that the hypothetically correct jury charge does not necessarily have to track exactly all of the charging instrument's allegations." Id. at 294.
- TEX. ELEC.CODE § 251.001(2), (3), (5); id. § 253.003(a), (e). Actually, it is less than clear to us that the Texas Election Code makes it a *felony* for TRMPAC to pass on corporate contributions to candidates. While it is certainly true that TRMPAC would commit a felony by knowingly *accepting* a political contribution for this purpose, under Section 253.003(b) of the Election Code, id. § 253.003(b), we find no provision in the Election Code making it an independent felony for TRMPAC, once it has illegally accepted such political contributions, to then pass those contributions on to candidates. The trial court instructed the jury in this case that such a transfer *was* an offense in its own right, but did so on authority of a provision in the Texas Election Code that governs political parties and their political action committees, not a non-party-affiliated general-purpose committee such as TRMPAC. In its final jury charge at the guilt stage of trial, the trial court informed the jurors:

It is a violation of Subchapter D of Chapter 253 of the Texas Election Code for a political party *or a General Purpose political committee* to use corporate contributions in Texas at any time for purposes other than to defray the normal overhead expenses and operating costs incurred by the party *or political committee* or to administer a primary election or convention held by a party.

(Emphasis added). But this language (except for the italicized portions) derives from a completely different chapter (*not* Chapter 253, much less Subchapter D of Chapter 253) of the Election Code, which governs only political parties, not general-purpose political committees such as TRMPAC. See TEX. ELEC.CODE § 257.002(a) ("A political party that accepts a contribution [from a corporation] may use the contribution only to ... defray normal overhead and administrative or operating costs incurred by the party; or ... administer a primary election or convention held by the party.").

The closest we can find to a provision in Chapter 253 that might serve to criminalize TRMPAC's direct transfer of received corporate contributions to a candidate, apart from Section 253.003(b)'s prohibition of the knowing *acceptance* of political contributions for that purpose, is to be found in Section 253.005. *See id.* § 253.005(a) ("A person may not knowingly make or authorize a political expenditure wholly or partly from a political contribution the person knows to have been made in violation of this chapter."). But a violation of this provision constitutes only a Class A misdemeanor, *id.* § 253.005(c), and so it cannot support a conviction for money laundering, which requires that the proceeds of criminal activity derive from a felony offense. TEX. PENAL CODE § 34.01(1)(A).

- See TEX. ETHICS COMM'N OP. NO. 277, at 1 (1995) ("Although the restrictions on corporate political activity do not specify that they apply only to activity in connection with Texas elections, we have stated before that the clear purpose of title 15 [of the Texas Election Code, which regulates political funds and campaigns] is to regulate Texas campaigns and Texas elections.") (citing TEX. ETHICS COMM'N OP. NO. 208 (1994) (Texas Election Code does not require general-purpose committees to report political expenditures made on out-ofstate campaigns and officeholders)).
- 51 TEX. PENAL CODE § 34.02(a)(2) (emphasis added).
- 52 See id. § 6.03(b) ("A person acts knowingly, or with knowledge, with respect to ... circumstances surrounding his conduct when he is aware ... that the circumstances exist.").
- 53 Liparota v. United States, 471 U.S. 419, 424 n. 7, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985) (quoting W. LaFave & A. Scott, CRIMINAL LAW § 27 (1972)).
- 1781 S.W.2d 600, 603, 604 (Tex.Crim.App.1989). See also Liparota, 471 U.S. at 426, 105 S.Ct. 2084 ("This construction is particularly appropriate where, as here, to interpret that statute otherwise would be to criminalize a broad range of apparently innocent conduct."); United States v. X-Citement Video, Inc., 513 U.S. 64, 69, 73, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) (in construing a federal offense containing an ambiguity with respect to how much of ensuing statutory language the word "knowingly" was meant to modify, the Supreme Court concluded that the culpable mental state must be applied broadly, noting that, "[i]f we were to conclude that 'knowingly' only modifies the relevant verbs in [the statute], we would sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material[,]" and that "the age of the performers is the crucial element separating legal innocence from wrongful conduct"); Celis v. State, 416 S.W.3d 419, 428 (Tex.Crim.App.2013) (plurality opinion) ("[C]ritical to the McQueen analysis was that the conduct regulated by the statute ... is an 'otherwise lawful act' that becomes criminal only under certain circumstances[.]").
- This is not to say that, in order to be convicted, the actor must also be aware that conducting, supervising, or facilitating a transaction that he *knows* involves proceeds of criminal activity constitutes money laundering. Under Section 8.03(a) of the Penal Code, "[i]t is no defense to prosecution that the actor was ignorant of the provisions of any law after the law has taken effect." TEX. PENAL CODE § 8.03(a). However, as we read Section 34.02(a)(2) of the Penal Code, it is an *element* of the offense of money laundering that the actor was aware of the fact that the money he is purported to have laundered was the proceeds of felony criminal activity. The federal money laundering statute similarly requires knowledge that the funds constitute ill-gotten gains. See 18 U.S.C. 1956(a)(1) ("Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity...."); United States v. Morelli, 169 F.3d 798, 804 (3d Cir.1999) (one of the elements of money laundering under this provision is "knowledge that the transaction involves the proceeds of some unlawful activity"). But, in order to commit the federal offense, the actor need not know that trafficking in what he knows to be ill-gotten gains constitutes money laundering.

 United States v. Sokolow, 91 F.3d 396, 408 (3d Cir.1996).
- We perceive at least two other potential bases to question the legitimacy of the State's "agreement" theory of criminal proceeds. Both questions derive from the statutory definition of "contribution" in Section

251.001(2) of the Election Code: "an agreement made ... to make a transfer." TEX. ELEC.CODE § 251.001(2). First of all, in order for the agreement between TRMPAC and RNSEC to exchange soft money deriving from corporate contributions for hard money to be given directly to political candidates to constitute an illegal *corporate* political contribution, so as to render the later transfer of hard money from RNSEC to the seven Texas candidates a transaction involving "criminal proceeds" for money laundering purposes, must the corporations themselves be parties to that agreement? After all, unless there is a violation of Subchapter D of Chapter 253 of the Election Code, which governs *corporate* contributions, there is no felony offense upon which to predicate convictions for money laundering or conspiracy to commit money laundering. And there is no evidence in the record that the corporate contributors had any knowledge of, much less complicity in, the money swap agreement between TRMPAC and RNSEC. Secondly, does an agreement to make a transfer of money constitute a "contribution" if the recipients of the transfer—here, the seven Texas candidates—are not parties to that agreement? It is at least arguable that the "agreement" contemplated by Section 251.001(2) of the Election Code must be between the contributor and the recipient. There is likewise no evidence in the record to show that any of the candidates was aware of TRMPAC's agreement with RNSEC. In light of our disposition, we need not resolve these questions today.

- 57 TEX. ELEC.CODE § 253.094(a), (c).
- See TEX. PENAL CODE § 1.03(b) ("The provisions of Titles 1, 2, and 3 [including Chapter 6] apply to offenses defined by other laws, unless the statute defining the offense provides otherwise[.]"); id. § 6.02(b) ("If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element."); id. § 6.02(c) ("If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.").
- 59 See note 39, ante.
- 60 E.g., Garza v. State, 213 S.W.3d 338, 349 (Tex.Crim.App.2007) ("We must presume that 'in enacting a statute, the Legislature intends the entire statute to be effective[,]' and did not intend a useless thing.") (quoting Heckert v. State, 612 S.W.2d 549, 552 (Tex.Crim.App.1981)).
- 62 Liparota, 471 U.S. at 424 n. 7, 105 S.Ct. 2084 (quoting W. LaFave & A. Scott, CRIMINAL LAW § 27 (1972)).
- FEX. ELEC.CODE § 253.003(a). See McQueen, 781 S.W.2d at 604 (noting the requirement of TEX. PENAL CODE § 1.02(4) that the Penal Code should be construed "to safeguard conduct that is without guilt from condemnation as criminal" to hold that "some form of culpability must apply to those 'conduct elements' which make the overall conduct criminal").
- 64 12 S.W.3d 31 (Tex.2000).
- 65 See TEX. ELEC.CODE § 253.131(a) ("A person who knowingly makes or accepts a campaign contribution or makes a campaign expenditure in violation of this chapter is liable for damages as provided by this section.").
- 66 Osterberg, 12 S.W.3d at 37–39.
- See TEX. ELEC.CODE § 253.003(b) ("A person may not knowingly accept a political contribution the person knows to have been made in violation of this chapter.") (emphasis added).
- Osterberg, 12 S.W.3d at 37–39. Four justices dissented, observing that "[t]he Court says 'knowingly' [in Section 253.131(a)] modifies only the act of spending money. But spending money on core First Amendment speech cannot, in and of itself, be against the law—there has to be something more." Id. at 67 (Enoch., J., dissenting). Later, the dissenters continued: "And while it may be 'natural' to give the statute the reading the Court does today, it is no less 'natural,' and indeed it is grammatically sound, to take the Constitution

into account and construe 'knowingly' to modify the entire succeeding phrase, including 'in violation of [the Election Code].' " [Id. at 68.

- See, e.g., State v. Johnson, 219 S.W.3d 386, 388 (Tex.Crim.App.2007) ("We are mindful of the proposition that criminal statutes outside the penal code must be construed strictly, with any doubt resolved in favor of the accused."); State v. Rhine, 297 S.W.3d 301, 309 (Tex.Crim.App.2009) ("Although the common-law rule that a penal statute is to be strictly enforced does not apply to the Penal Code [citing TEX. PENAL CODE § 1.05(a)], criminal statutes outside the penal code must be construed strictly, with any doubt resolved in favor of the accused.") (footnote and internal quotation marks omitted).
- ⁷⁰ Liparota, 471 U.S. at 427, 105 S.Ct. 2084 (internal quotation marks omitted).
- 71 McQueen, 781 S.W.2d at 603–04.
- 72 X-Citement Video, Inc., 513 U.S. at 72, 115 S.Ct. 464.
- RoBold testified he told the corporations only "that there is an opportunity to give corporate funds that would be utilized to help underwrite the administrative expense of TRMPAC who is also raising personal funds[,]" the personal funds, in turn, presumably for the purpose of making direct contributions to candidates. He would "normally make [it] very clear" that corporate donations would only be used for TRMPAC's administrative costs, to free up individual donations for candidate contributions. He acknowledged that the fund-raising literature emphasized TRMPAC's priority to channel contributions to candidates, but pointed out that this literature was directed at both corporate and individual contributors. He flatly denied ever having personally "hinted" to corporate donors that their contributions were "going to go to candidates." But some of the corporate executives denied that (or simply did not remember whether) RoBold expressly told them that their contributions would be limited to defraying TRMPAC's administrative costs. The corporate executive for Sears testified that RoBold did not tell him his corporate contribution could only be put to a limited use but in fact told him instead that it would be used "[t]o elect more Republicans to Congress in Texas." In its pretrial diversion agreement with the Travis County District Attorney, Sears claimed to have made its corporate "contribution".]"
- For example, notwithstanding Sears's pretrial diversion agreement with the District Attorney, the Sears executive maintained:
 - A. I never thought I did anything illegal.
 - Q. Still don't?
 - A. Right.
 - Q. And if RoBold said it was a—it was legal, you believed him and you still believe him, right?
 - A. Well, I—I don't know about that. I believed it was legal at the time. I certainly did and I would never intentionally violate a campaign law at any level.
- See TEX. PENAL CODE § 6.03(c) ("A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct ... when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist[.]"); id. § 6.03(d) ("A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct ... when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist[.]").
- The majority in *Baird* held, for the first time, that in order for evidence to be suppressed under Article 38.23 of the Texas Code of Criminal Procedure, the defendant has the burden to prove that the State committed a crime in obtaining the evidence.
- In Wehrenberg, in an effort to support its conclusion that evidence was derived from an independent source rather than a warrantless entry, the majority ratified, for the first time, the State's actions in obtaining a search warrant based on the prediction of a future crime, rather than one that had already been committed.

APPENDIX 3



Texas

Debra Spisak Clerk of the Court Court of Appeals for the Second District of Texas 401 West Belknap, Suite 9000 Fort Worth, TX 76196-0211

Re: Crystal Mason v. State of Texas, No. 02-18-0038-CR

Dear Ms. Spisak,

For the Court's convenience, counsel for Appellant submits this short letter to provide the Court with sourcing for a representation made at oral argument on September 10, 2019. At argument, counsel referred to the large number of individuals whose provisional ballots were rejected in Texas because they were incorrect about their eligibility to vote in a specific political subdivision or precinct, despite affirming such facts under oath and providing their residential address on their provisional ballots.

Pursuant to data collected by the federally created Election Assistance Commission (EAC)¹ from its 2016 and 2018 Election Administration and Voting

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS

¹ EAC collects state-by-state, jurisdiction-by-jurisdiction data on a variety of administration topics, including the number of provisional ballots cast, the number rejected, and the reasons for those rejections. *See* U.S. EAC, EAVS FAQS, https://www.eac.gov/research-and-data/eavs-faqs/.

Survey (EAVS),² in the 2016 general election, 67,273 provisional ballots were submitted in Texas. 54,850 were rejected, and, of the rejected ballots, 44,046 (80.3%) were rejected because the individual was not registered in the relevant precinct or subdivision. In Tarrant County, 4,463 provisional ballots were submitted. 3,990 were rejected, and 3,942 (98.8%) of those rejected ballots were for not being registered in the relevant precinct or subdivision.

In the 2018 general election, 54,179 provisional ballots were submitted in Texas. 40,834 were rejected, and, of those rejected ballots, 31,837 (78.0%) were rejected for not being registered in the relevant precinct or subdivision. In Tarrant County, 4,321 provisional ballots were submitted. 3,800 were rejected, and 3,754 (98.8%) of rejected ballots were for not being registered in the relevant precinct or subdivision.³

Thank you for your consideration.

² See EAVS 2016 Dataset, https://www.eac.gov/assets/1/6/EAVS_2016_Final_Data_for_Public_Release_v4_xls1.zip; EAVS 2018 Dataset, https://www.eac.gov/assets/1/6/EAVS_2018_for_Public_Release.xlsx

The number of provisional ballots rejected by reporting counties in Texas due to not being registered in the precinct is calculated by adding together the number of ballots rejected for those who submitted provisional ballots but were not registered in the state, were registered in the state but were in the wrong jurisdiction, or were registered in the state but were in the wrong precinct. *See* U.S. EAC, 2018 EAVS Instrument at U.S. EAC at 23-24, *available at* https://www.eac.gov/assets/1/28/2016 EAVS Instrument.pdf; 2018 EAVS Instrument at 31-33, *available at* https://www.eac.gov/assets/1/6/2018 EAC Election Administration and Voting Survey Instrument.pdf.

Sincerely,

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** Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Letter has been served on Appellee's counsel of record via e-service on this the 26th day of September, 2019.

/s/Thomas Buser-Clancy
Thomas Buser-Clancy

APPENDIX 4



In the Court of Appeals Second Appellate District of Texas at Fort Worth

No. 02-18-00138-CR

CRYSTAL MASON, Appellant

V.

THE STATE OF TEXAS

On Appeal from the 432nd District Court Tarrant County, Texas Trial Court No. 1485710D

Before Kerr, Birdwell, and Bassel, JJ. Opinion by Justice Birdwell

OPINION

I. Introduction

Having waived a jury trial, Appellant Crystal Mason appeals from her conviction by the trial court for illegal voting, a second-degree felony, *see* Tex. Elec. Code Ann. § 64.012(a)(1), (b), and her sentence of five years' confinement. Mason raises the following challenges to her conviction and sentence: (1) the evidence is legally and factually insufficient to support the guilt finding; (2) Texas's illegal-voting statute is preempted by the part of the Help America Vote Act (HAVA) that grants the right to cast a provisional ballot, 52 U.S.C.A. § 21082(a) (West 2015); (3) her conviction resulted from ineffective assistance of counsel; and (4) the illegal-voting statute is unconstitutionally vague as applied to her. We will affirm.

II. Background

A. Mason voted in the 2004 and 2008 general elections in Tarrant County, Texas.

In the 2004 general election, Mason filled out an Affidavit of Provisional Voter form promulgated by the Texas Secretary of State, in which she listed her Tarrant County address in Everman, birthdate, social security number, and driver's license number; she also checked a box saying that she is a United States citizen. The affidavit form has two parts: a right side with blanks in which the provisional voter completes the above-described information and a left side that includes affirmations that the voter is "a registered voter of th[e] political subdivision and in the precinct" in which

the person is attempting to vote and that the voter has "not been finally convicted of a felony or if a felon, . . . [has] completed all . . . punishment including any term of incarceration, parole, supervision, [or] period of probation, or . . . [has] been pardoned." Her completion of this form served as an application to register to vote in Tarrant County from that point forward. See Tex. Elec. Code Ann. § 65.056(a) ("If the affidavit on the envelope of a rejected provisional ballot contains the information necessary to enable the person to register to vote under Chapter 13, the voter registrar shall make a copy of the affidavit . . . [and] treat the copy as an application for registration"). Tarrant County accepted the application and registered her as a voter. Mason later voted in the November 2008 general and special elections in Tarrant County as a registered voter, but she had moved by then and had a different Tarrant County address (the Rendon address).

¹The full text on the left side of the affidavit form is in both English and Spanish under the title, TO BE COMPLETED BY VOTER, and reads as follows:

I am a registered voter in this political subdivision and in the precinct in which I'm attempting to vote and have not already voted in this election (either in person or by mail). I am a resident of this political subdivision, have not been finally convicted of a felony or if a felon, I have completed all of my punishment including any term of incarceration, parole, supervision, period of probation, or I have been pardoned. I have not been determined by a final judgment of a court exercising probate jurisdiction to be totally mentally incapacitated or partially mentally incapacitated without the right to vote. I understand that giving false information under oath is a misdemeanor, and I understand that it is a felony of the 2nd degree to vote in an election for which I know I am not eligible.

B. Mason pleaded guilty to a federal conspiracy felony, and the federal district court sentenced her to a maximum term of five years' imprisonment followed by a maximum term of three years' supervised release.

On November 23, 2011, Mason pleaded guilty to one count of conspiracy to defraud the United States in violation of 18 U.S.C.A. § 371 (tax fraud), a Class D felony. 18 U.S.C.A. §§ 371, 3559(a)(4) (West 2015). A person convicted of this offense is subject to a maximum term of imprisonment of five years and a maximum term of post-imprisonment supervised release of three years. *Id.* §§ 371, 3559(b), 3581(b)(4), 3583(a), (b)(2) (West 2015). On March 19, 2012, a federal district judge found her guilty and sentenced her to the maximum term of both: five years' imprisonment and three years' supervised release "upon release from imprisonment." Mason did not appeal but later filed a postconviction motion to vacate, set aside, or correct the sentence under 28 U.S.C.A. § 2255. *United States v. Mason-Hobbs*, Nos. 4:13-CV-078-A, 04:11-CR-151-A-1, 2013 WL 1339195, at *2 (N.D. Tex. Apr. 3, 2013) (mem. op. and order), *aff'd*, 579 Fed. App'x 248, 248–49 (5th Cir. 2014).²

As grounds for the motion, Mason alleged ineffective assistance of trial counsel and sought a reduction in her sentence. But the district court denied the motion,

²In its order denying relief, the district court described the legal standard for Section 2255 relief: "After conviction and exhaustion, or waiver, of any right to appeal, courts are entitled to presume that a defendant stands fairly and finally convicted. A defendant can challenge her conviction or sentence after it is presumed final on issues of constitutional or jurisdictional magnitude only" *Mason-Hobbs*, 2013 WL 1339195, at *2 (citations omitted).

making it clear that Mason had avoided a much stiffer sentence³ only through the "exceptionally good" representation of her trial counsel. *Id.* at *2–6. Thus, there is no question that Mason's federal conviction had become final by at least 2013.

C. Upon Mason's federal felony conviction, her local elections authority cancelled her voter registration.

Upon Mason's conviction, the prosecuting United States Attorney had to give written notice of her conviction to the Texas Secretary of State, the "chief State election official" under Section 20507(g)(1) of the National Voting Rights Act ("NVRA"). 52 U.S.C.A. §§ 20507(g)(1), 20509 (West 2015); see Tex. Elec. Code Ann. § 31.001(a) ("The secretary of state is the chief election officer of the state."); Cascos v. Tarrant Cty. Democratic Party, 473 S.W.3d 780, 786 (Tex. 2015) ("The secretary of state is the state's chief election officer responsible for ensuring the uniform

It would require a sentence of at least 60 months to begin to adequately and appropriately address the factors the Court should consider under 18 United States Code § 3553(a) ["Factors to be considered in imposing a sentence."]. So I plan to impose a sentence of 60 months.

Id. at *5–6.

³As the federal trial judge explained while addressing Mason's trial counsel during her sentencing hearing,

In this case, were it not for the fact that she was charged with only one offense, and obviously she could have been charged with multiple offenses, her Guideline range would have been 87 to 108 months. So you have done an exceptionally good job on behalf of your client . . . for figuring out how to get the Government to charge her with only one offense. And by doing so you have capped her sentence at 60 months.

application and interpretation of election laws throughout Texas."). The NVRA-mandated notice includes the following information for the convicted person: name, age, residence address, date of entry of the judgment of conviction, description of the offenses of which the individual was convicted, and sentence imposed. 52 U.S.C.A. § 20507(g)(2) (West 2015). Moreover, the NVRA mandates that the Texas Secretary of State provide the same information to the "voter registration officials of the local jurisdiction" in which the convicted person resides. *Id.* § 20507(g)(5).

In accordance with the NVRA's requirements, the Tarrant County Elections Administration ("TCEA") ultimately received an April 26, 2013 report from the Texas Secretary of State, which included 2012 federal felony sentences for Texas residents, including Mason's. In addition to the NVRA-mandated information, the report included the last four digits of Mason's social security number. More particularly, for all federal felony sentences, the report identified the specific United States Attorney's office providing the information and included columns for the date of the sentence, the charges made the basis of the conviction, the months of custody, and the years of supervised release. For Mason, the report confirmed a March 2012⁴ conviction pursuant to 18 U.S.C.A. § 371 for "[c]onspiracy to commit offense or to defraud US" with a sentence of sixty months in federal custody and three years of supervised release. Finally, the report listed Mason's home address as the Rendon address.

⁴The report mistakenly listed the day of her conviction as March 18, 2012.

After receiving the report, the TCEA mailed a Notice of Examination dated May 22, 2013, to Mason at the Rendon address indicating that it was examining her voter registration because it had received information about her felony conviction. The notice also informed Mason that if she did not reply within thirty days providing "adequate information or documentation" establishing her qualifications to remain registered, her registration would be cancelled. *See* Tex. Elec. Code Ann. § 16.033 (providing for cancellation of voter registration following investigation of eligibility).

On June 25, 2013, the TCEA mailed Mason a Notice of Cancellation of Voter Registration to the Rendon address indicating that because Mason had not responded to the Notice of Examination, her voter registration in Tarrant County had been cancelled. *See id.* § 16.031(a)(3) (providing for immediate cancellation of registration on receipt of "an abstract of a final judgment of the voter's . . . conviction of a felony"). The notice further indicated that she was entitled to a hearing on written request and that she could appeal any adverse decision by petitioning for review in a state district court. *See id.* § 16.036.

It is undisputed that the TCEA mailed both notices to the Rendon address while Mason was serving her sixty-month term of imprisonment in federal custody. Mason denied ever having received the notices. But neither were ever returned to the TCEA. Upon cancelling Mason's Tarrant County voter registration, the TCEA changed her registration status to "cancelled" in its computerized voter-registration system and, specific to her registration status, added a reference to the Texas Secretary

of State's 2012 report of federal felony sentences in the "Comments" section: "SOS Felon List."

D. After completing her sixty-month term of imprisonment and during her supervised-release period, Mason cast a provisional ballot in the November 2016 general election; a grand jury subsequently indicted her for the offense of illegal voting.

On November 6, 2015, Mason was released from federal custody to a re-entry halfway house. While there, she—in her own words—"had to go through pre-release classes where you have to go back and meet with different people and sign papers and everything before you actually go on probation." She was released from the halfway house on August 5, 2016.⁵ That same day, she reported to the federal probation office—as she had been ordered to do in her final judgment of conviction—and met with the officer assigned to supervise her. She reported that her residence would be the Rendon address. According to the lead supervisor in the probation office, no one in the office told Mason that she could not vote while on supervised release because "[t]hat's just not something [they] do."

On November 8, 2016, Mason went to her designated polling place so that she could vote in the general election. She presented a valid driver's license with correct information, but the teen worker checking the voter-registration roll could not find her name after looking under both "Mason" and "Hobbs." Because Mason's name was not on the voter-registration roll even though she was at the correct polling

⁵Mason clarified that she lived at the halfway house for three months and was confined to her home for six months.

location based on her driver's license residence—the Rendon address—election workers offered to let her complete a provisional ballot, which she agreed to do. As she had done in 2004, Mason filled out an Affidavit of Provisional Voter and signed it. She was given a code for a provisional ballot, selected her choices on a voting machine, and cast her provisional ballot electronically.

Mason's neighbor Karl Dietrich, the elections judge for the precinct in which Mason resided, called the Tarrant County District Attorney's Office the day after the general election to report a concern that the teen worker had brought to his attention about Mason's provisional ballot.⁶ Several months later, a grand jury issued an indictment alleging that Mason had, in the 2016 general election, "vote[d] in an election in which she knew she was not eligible . . . after being finally convicted of the felony of Conspiracy to Defraud the United States . . . , and [she] had not been fully discharged from her sentence for the felony including any court ordered term of parole, supervision and probation."

Mason waived a jury, and after hearing evidence, the trial judge found her guilty and sentenced her to five years' confinement. *See id.* § 64.012(b); Tex. Penal Code Ann. § 12.33(a) (providing the range of incarceration for a second-degree felony as between two to twenty years). Mason filed a motion for new trial, which the trial court denied after an evidentiary hearing. Mason then filed this appeal.

⁶He did not elaborate on this concern in the record because the trial court sustained Mason's hearsay objection.

III. Sufficiency of the Evidence

In her first and second points, Mason challenges the sufficiency of the evidence to support her conviction. Within her complaint, she raises two statutory-construction questions that inform the hypothetical jury charge by which we measure evidence's sufficiency⁷: (1) Does the term "supervision" in Election Code Section 11.002(a)(4)(A), describing who is qualified to vote, include post-imprisonment supervised release imposed as part of a federal sentence? and (2) Does the word "vote" in Section 64.012(a)(1) include casting a provisional ballot? We will address both of these construction questions within the context of her two points. *See, e.g., Lang v. State,* 561 S.W.3d 174, 179 (Tex. Crim. App. 2018); *Delay v. State,* 465 S.W.3d 232, 235 (Tex. Crim. App. 2014) ("[S]ometimes appellate review of legal sufficiency involves simply construing the reach of the applicable penal provision in order to decide whether the evidence, even when viewed in the light most favorable to conviction, actually establishes a violation of the law.").

Although we review sufficiency of the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime's essential elements beyond a reasonable doubt, *Jackson v. Virginia*, 443 U.S. 316, 319, 99 S. Ct. 2781, 2789 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App.

⁷See Jenkins v. State, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016) (explaining requisites of hypothetically correct jury charge); *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997) (noting that hypothetical jury charge benchmark against which to perform sufficiency review "can uniformly be applied to all trials, whether to the bench or to the jury").

2017),⁸ we review these statutory-construction questions de novo, *Lang*, 561 S.W.3d at 180. Additionally, we must construe criminal statutes outside the penal code strictly, resolving any doubt in the accused's favor. *State v. Rhine*, 297 S.W.3d 301, 309 (Tex. Crim. App. 2009). But in doing so, we may not ignore a statute's plain language. *State v. Johnson*, 219 S.W.3d 386, 388 (Tex. Crim. App. 2007).

A. Background law and indictment

Only a "qualified voter" may vote in an election in Texas; individuals convicted of felonies or other enumerated crimes forfeit the franchise. Tex. Elec. Code Ann. § 11.001; *see* Tex. Const. art. VI, § 1(a)(3) (prohibiting convicted felons from voting "subject to such exceptions as the Legislature may make"), § 1(b) (directing the Texas Legislature to prohibit persons convicted of "bribery, perjury, forgery, or other high crimes" from voting). A person convicted of a felony is re-enfranchised in one of two ways: (1) if the person has "fully discharged the person's sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court," Tex. Elec. Code Ann. § 11.002(a)(4)(A), or (2) if the person

⁸We use only one standard of review to measure the sufficiency of the State's evidence in criminal cases. *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Although Mason raised both legal and factual sufficiency complaints, she acknowledges that we apply only one standard of review to our consideration of the sufficiency of the State's evidence.

has "been pardoned or otherwise released from the resulting disability to vote," id. § 11.002(a)(4)(B).9

⁹Curiously, although in Article VI, Section 1(a)(3) the Texas constitution allows the legislature to enact conditions for the re-enfranchisement of felons generally, Article VI, Section 1(b) immediately following it mandates that the legislature categorically exclude persons convicted of "bribery, perjury, forgery, or other high crimes" from re-enfranchisement. Tex. Const. art. VI, § 1(b). Section 1(b) was not originally in Article VI; instead, before voters approved amendments reorganizing the Texas constitution in 2001, Section 1(b) was included in former Article XVI, Section 2 and read, "Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, those who may have been or shall hereafter be convicted of bribery, perjury, forgery, or other high crimes." The reorganizational amendments voters approved in 2001 moved Section 1(b) to its current location but did not substantively change its mandatory language. Thus, it appears that the Texas constitution does not allow the *legislature* to re-enfranchise a person convicted of "bribery, perjury, forgery, or other high crimes." Nevertheless, the statutory definition of "qualified voter" in the Election Code does not appear to even acknowledge the absolute constitutional disenfranchisement for "bribery, perjury, forgery, and other high crimes" convictions. See also Tex. Att'y Gen. Op. No. KP-0251 (2019) (discussing eligibility of convicted felons to run for office in Texas after completing their sentences and having their voting rights restored, without discussing Article VI, Section 1(b)'s mandatory exclusion of certain felonies). But see Tex. Att'y Gen. Op. No. GA-0141 (2004) (recognizing distinction).

In construing the former version of Article XVI, Section 2, the Texas Court of Criminal Appeals—in *Perez v. State*, which was handed down before the 2001 constitutional amendments—held that the term "high crimes" as used in that section did not mean simply all felony convictions but rather crimes of "moral corruption and dishonesty." 11 S.W.3d 218, 220–22 (Tex. Crim. App. 2000) (observing that the former version of Article XVI, Section 2's absolute exclusion from "office, serving on juries, and from the right of suffrage" for such crimes has appeared as a distinct constitutional prohibition, apart from the more general prohibition as to felony convictions, since 1845); *see also Rice v. State*, 107 S.W. 832, 833 (Tex. Crim. App. 1908) (holding that individual finally convicted and sentenced for perjury was absolutely disqualified from serving on a jury absent gubernatorial pardon); *Easterwood v. State*, 31 S.W. 294, 296–97 (Tex. Crim. App. 1895) (noting that full gubernatorial pardon restores constitutionally disqualified individual "to his right of suffrage, and his competency as a juror"). *But see* Tex. Const. art. VI, § 1 cmt. ("|T|he constitution of

"A person commits an offense if the person . . . votes or attempts to vote in an election in which the person knows the person is not eligible to vote." $Id. \S 64.012(a)(1)$. Texas law has long provided that to prove the commission of this offense, the State need only show beyond a reasonable doubt that the defendant voted while knowing of the condition that made the defendant ineligible; ¹⁰ the State does not have to prove that the defendant subjectively knew that voting with that

the Republic stipulated that laws were to be passed excluding from the right of suffrage those who in the future were convicted of bribery, perjury, or other high crimes and misdemeanors . . . This stipulation was carried over into the Constitution of 1845 with some slight changes, the list of crimes reading: bribery, perjury, forgery, or other high crimes The same crimes appear in all subsequent constitutions until the present one *in which it was limited solely to felonies*." (emphasis added)).

In *In re Birdwell*, also issued before the 2001 constitutional amendments, the Supreme Court of Texas held that a federal conviction for conspiracy to defraud the United States in violation of 18 U.S.C.A. § 371 is a crime of moral turpitude that mandates disbarment under the Texas Rules of Disciplinary Procedure, involving, as it does, conduct that is deceitful or dishonest. 20 S.W.3d 685, 686–88 (Tex. 2000). Since Birdwell's—and Mason's—indictments and guilty pleas both involved allegations of tax fraud against the United States by frustrating the Internal Revenue Service's lawful, federal-income-tax-related functions, it appears that the Texas Supreme Court—at least for purposes of the civil law—would consider Mason's federal conviction to be for a "high crime," thus raising the question of whether the *legislature* could ever re-enfranchise her via Section 11.002(a)(4)(A) without running afoul of Article VI, Section 1(b).

¹⁰See Tex. Penal Code Ann. § 6.03(b) (providing that a person acts with knowledge of the circumstances surrounding his conduct when he is aware that the circumstances exist); cf. Goss v. State, 582 S.W.2d 782, 783−85 (Tex. Crim. App. 1979) (holding that for duty to stop and render aid to arise—for purposes of prosecution for failure to stop and render aid under former version of statute—defendant must have known of the circumstances present when he failed to stop, that is, he must have known that an accident had occurred; therefore, the mens rea for the offense was knowing) (cited by Curry v. State, No. PD-0577-18, 2019 WL 5587330, at *4−5 (Tex. Crim. App. Oct. 30, 2019)).

condition made the defendant ineligible to vote under the law or that to vote while having that ineligibility is a crime. *See, e.g., Thompson v. State,* 9 S.W. 486, 486–87 (Tex. Ct. App. 1888);¹¹ *Jenkins v. State,* 468 S.W.3d 656, 672–73 (Tex. App.—Houston [14th Dist.] 2015), *pet. dism'd, improvidently granted,* 520 S.W.3d 616 (Tex. Crim. App. 2017) (per curiam); *Medrano v. State,* 421 S.W.3d 869, 884–85 (Tex. App.—Dallas 2014, pet. ref'd);¹² *see also* Tex. Penal Code Ann. § 8.03(a) ("It is no defense to prosecution that

¹²Neither Mason nor the State cites *Thompson*, *Medrano*, *Jenkins*, or related onpoint authority, which rendered much of the trial testimony superfluous. The authority Mason relies on to argue that the State had to prove her subjective knowledge that she was committing a crime is inapposite and does not relieve us of the duty to follow on-point authority from the higher court. *See State ex rel. Vance v. Clawson*, 465 S.W.2d 164, 168 (Tex. Crim. App. 1971); *Wiley v. State*, 112 S.W.3d 173, 175 (Tex. App.—Fort Worth 2003, pet. ref'd).

For example, Mason relies on the Court of Criminal Appeals's analysis in *Delay* to argue that the State had to prove that she knew being on supervised release made her legally ineligible to vote. But the different statutes at issue in *Delay* were ambiguous; thus, the court of criminal appeals had to engage in a different analysis to determine the correct mens rea that the State would have to prove for each of them.

Texas Court of Criminal Appeals, the Texas Court of Appeals's opinions are precedential and binding on this court. See Hon. James T. "Jim" Worthen, The Organizational & Structural Development of Intermediate Appellate Courts in Texas, 1892–2003, 46 S. Tex. L. Rev. 33, 34–35 (2004) (explaining that Court of Appeals, predecessor to Court of Criminal Appeals, was added to the judiciary by the 1876 constitution as an addition to the Texas Supreme Court, not as an intermediate court, but as a court with jurisdiction to hear all criminal appeals from trial courts); Robert W. Higgason, A History of Texas Appellate Courts: Preserving Rights of Appeal Through Adaptations to Growth, Part 1 of 2: Courts of Last Resort, 39 Hous. Law. 20, 24 (2002); see also Dylan O. Drummond, Citation Writ Large, 20 App. Advoc. 89, 96 (2007) (explaining that opinions of the Texas Court of Appeals between April 18, 1876, and August 13, 1892, must be accorded the precedential value of the highest court of the state for criminal matters).

the actor was ignorant of the provisions of any law after the law has taken effect."); Crain v. State, 153 S.W. 155, 156 (Tex. Crim. App. 1913) (rejecting argument that defendant was entitled to instruction that he could not have been illegally possessing pistol if he was carrying the cylinder in one pocket but the rest in his other pocket, explaining, "If appellant only did the acts he intended to do, believing that same was no violation of law, yet, if in fact such acts were prohibited by law, he would be punishable, for all persons are presumed to know what the law prohibits one from doing."); Heath v. State, No. 14-14-00532-CR, 2016 WL 2743192, at *6 (Tex. App.—Houston [14th Dist.] May 10, 2016, pet. ref'd) (mem. op., not designated for publication) (citing Medrano).

When the Texas Court of Appeals decided *Thompson* in 1888, the illegal-voting statute was substantially the same as today's Section 64.012(a)(1): "If any person knowing himself not to be a qualified voter, shall, at any election, vote, or offer to

⁴⁶⁵ S.W.3d at 246–47, 249–51 (construing ambiguous money-laundering statute to require proof of knowledge of criminal nature of facilitated transaction and construing Election Code provision prohibiting certain donations by corporations to require, "as written,... that the actor be aware, not just of the particular circumstances that render his otherwise-innocuous conduct unlawful, but also of the fact that undertaking the conduct under those circumstances in fact" violates the Election Code). The statutes in *Delay* were ambiguous because they placed the "knowingly" descriptor before both the verb describing the actus reas and the following clause describing the actus reas; Section 64.012(a)(1) places the word "knows" after the actus-reas verb and immediately before the word describing the attendant circumstances—"ineligible." Thus, what "knows" was intended to describe in Section 64.012(a)(1) is not ambiguous, as was the word placement in the statutes at issue in *Delay*. See Tex. Gov't Code Ann. § 311.011(a) (providing that courts must read words and phrases according to grammar and common usage rules).

vote, for any officer to be then chosen, he shall be punished by confinement in the penitentiary not less than two nor more than five years." *See Medrano*, 421 S.W.3d at 884–85 & n.5 (noting also that the 1879 Penal Code may be accessed on the Texas State Law Library website). In *Thompson*, the Texas Court of Appeals held that the following instruction in an illegal-voting case was proper: "If the defendant had been convicted of an assault with the intent to murder, as alleged in the indictment in this cause, and if he knew at the time he so voted that he had been so convicted, such knowledge of his conviction would be equivalent in law to knowing himself not to be a qualified voter." ¹³ 9 S.W. at 486–87. Citing the principle that a person is presumed to know both the civil and criminal law, the court held that the State did not have to prove that Thompson knew that voting after being finally convicted of a felony was illegal. *Id.* The court concluded,

[I]f we were to hold the law to be that the state must prove that the defendant knew that the offense of which he had been convicted was a felony, and that such conviction disqualified him to vote, the effect would be that a conviction for illegal voting by persons convicted of felony could rarely be obtained, because it would be an exceptional case in which such proof could be made.

Id. at 487 (emphasis added).

In more recent years, the Dallas Court of Appeals followed *Thompson* in *Medrano*—an illegal-voting case under Section 64.012(a)(1) in which the defendant's residence was not in the precinct in which she voted—explaining that "the State did

¹³At the time, the Texas constitution did not authorize the legislature to reenfranchise persons convicted of any type of felony. *See infra* n.16.

not need to prove [Medrano] subjectively knew she was not eligible to vote; it needed only to prove she voted in the March 2010 Dallas County Primary Election when she knew she was not a resident of the precinct for which she was voting." 421 S.W.3d at 885. The Houston Fourteenth Court of Appeals likewise relied upon this statement of law in *Jenkins*, 468 S.W.3d at 672–73, and *Heath*, 2016 WL 2743192, at *1–2, *6, illegal-voting prosecutions under Section 64.012(a)(1) arising from the same election. Thus, contrary to Mason's assertion, the fact that she did not know she was legally ineligible to vote was irrelevant to her prosecution under Section 64.012(a)(1); instead, the State needed only to prove that she voted while knowing of the existence of the condition that made her ineligible, in this case—as alleged by the State—that she was on federal supervised release after being released from imprisonment after a final felony conviction.

An illegal-voting defendant's subjective belief about the law becomes relevant only if the evidence raises either (1) the affirmative defense of mistake of law, in which the issue is not whether the defendant simply did not know the conduct was a crime but that, because of reasonable reliance on an official statement or interpretation of the law by a statutorily prescribed source, the defendant affirmatively believed that the conduct was not criminal, *see Jenkins*, 468 S.W.3d at 671–80 (discussing whether mistake-of-law affirmative defense raised by evidence); *see also* Tex. Penal Code Ann. § 8.03(b) (describing mistake-of-law affirmative defense); or (2) the defense of mistake of fact, in which a factual mistake negates the offense's

mens rea, see Tex. Penal Code Ann. § 8.02; ef. Curry, 2019 WL 5587330, at *7 (explaining that mistake-of-fact defense was raised in failure-to-stop-and-render-aid prosecution when some evidence showed that defendant knew he was involved in an accident but mistakenly believed that he had collided with road debris or a beer bottle, not a person). But some evidence must raise these issues before a factfinder is required to consider them. See Allen v. State, 253 S.W.3d 260, 267 (Tex. Crim. App. 2008).

Based on the foregoing, if casting a provisional ballot constitutes the act of voting under Election Code Section 64.012(a)(1) and if being on post-imprisonment supervised release for a federal offense constitutes being on supervision under Election Code Section 11.002(a)(4)(A), the State here needed to prove only that Mason voted while knowing she had been finally convicted of a felony and had not yet completed her supervised release. *See Medrano*, 421 S.W.3d at 881–85. Mason does not argue that the evidence failed to show that she knew she was still on supervised release after her final federal conviction when she cast her provisional ballot. Instead, she challenges whether Section 11.002(a)(4)(A) and Section 64.012(a)(1) apply to her circumstances.

B. "Supervision" in Section 11.002(a)(4)(A) includes post-imprisonment supervised release imposed as part of a federal sentence.

As part of her first and second points, Mason argues that a person who has been convicted by a federal court and thereafter released from confinement to "supervised release" has "fully discharged" his or her federal sentence under Section 11.002(a)(4)(A) because the Texas Legislature meant for the term "supervision" to apply only to "community supervision" imposed under state law.

The Texas Code of Criminal Procedure defines a sentence as "that part of the judgment . . . that orders that *the punishment* be carried into execution in the manner prescribed by law." Tex. Code Crim. Proc. Ann. art. 42.02 (emphasis added). The plain language of this statute "indicates that a sentence is nothing more than the portion of the judgment setting out the terms of punishment." *State v. Ross*, 953 S.W.2d 748, 750 (Tex. Crim. App. 1997). A legal sentence may include a term of years, a fine, "the fact of shock or regular probation" (community supervision), and sentencing enhancements but not (to name but a few) restitution, probation terms, or court costs. *See Burg v. State*, No. PD-0527-18, 2020 WL 467589, at *5 (Tex. Crim. App. Jan. 29, 2020).

Under federal law, supervised release similarly is part of a convicted person's sentence: "The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." 18 U.S.C.A. § 3583(a) (emphasis added); see United States v. Pettus, 303 F.3d 480, 482 (2d Cir. 2002) ("[S]upervised release is part of the whole matrix of punishment arising out of the original offense . . . "); cf. United States v. Saleem, Nos. 1:07cr252 (LMB), 1:10cv893 (LMB), 2010 WL 4791654, at *2 (E.D. Va. Nov. 15, 2010) (mem. op.) (rejecting

argument that sentence for conviction of conspiracy to defraud the United States does not and cannot include a term of supervised release). Thus, under federal law, Mason had to successfully serve her entire period of post-imprisonment supervised release as part of her punishment.

The term "supervision" as used in Section 11.002(a)(4)(A) is not defined in the Election Code. Supervision is likewise not defined in the Code of Criminal Procedure, but "community supervision" is defined, solely for the purposes of Chapter 42A, as

the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period during which:

- (A) criminal proceedings are deferred without an adjudication of guilt; or
- (B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part.

Tex. Code Crim. Proc. Ann. art. 42A.001(1). For purposes of describing Chapter 42A status, "community supervision" and "probation" are synonymous and generally used interchangeably. *Hongpathoum v. State*, 578 S.W.3d 213, 214 n.1 (Tex. App.—Fort Worth 2019, no pet.); *see* Tex. Const. art. IV, § 11A (authorizing the suspension of imposition or execution of sentence after conviction and placement of the defendant on "probation").

Black's Law Dictionary defines supervision as "[t]he series of acts involved in managing, directing, or overseeing persons or projects."

14 Supervision, Black's Law Dictionary (11th ed. 2019). It defines probation as "[a] court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison, usu. on condition of routinely checking in with a probation officer over a specified period of time."

Probation, id. Black's further defines parole as "[t]he conditional release of a prisoner from imprisonment before the full sentence has been served" and notes that "parole is usu. granted for good behavior on the condition that the parolee regularly report to a supervising officer for a specified period." Parole, id.

Applying normal grammar rules and construction aids to Section 11.002(a)(4)(A)'s phrase, "has not been finally convicted of a felony or, if so convicted, has . . . fully discharged the person's sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court," we glean two important meanings. First, this subsection contemplates that under Texas law the punishment for a criminal conviction—a sentence—can consist

¹⁴See Tex. Elec. Code Ann. § 1.003(a) (providing that Code Construction Act applies to Election Code except where expressly stated otherwise); Tex. Gov't Code Ann. § 311.011 (providing that, in addition to reading words and phrases according to grammar and common usage rules, courts must also read them according to any technical or particular meanings that they have acquired or been assigned); Ex parte White, 400 S.W.3d 92, 93 (Tex. Crim. App. 2013) (reciting that court construes words in a statute according to their plain meanings unless those constructions would lead to absurd results that the legislature could not have possibly intended).

of one or a combination of consequences. By introducing the words "incarceration," "parole," and "supervision"—and the phrase "completed a period of probation"—with the word "including," the legislature indicated that those things are not an exhaustive list of what can be included in a sentence. *See* Tex. Gov't Code Ann. art. 311.005(13) ("Includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."). The plain wording of the statute indicates that whatever modes of punishment—one or more—make up a sentence, they must all be completed for the person to regain eligibility to vote after a felony conviction.

Second, in Section 11.002(a)(4)(A), supervision and probation are listed separately from each other as well as from parole and incarceration. Thus, the legislature could not have intended supervision and probation to mean the same thing. See Campbell v. State, 49 S.W.3d 874, 876 (Tex. Crim. App. 2001) ("In analyzing the language of a statute, we assume that every word has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible."); cf. United States v. Reyes, 283 F.3d 446, 458 (2d Cir. 2002) (explaining that federal supervised release differs from parole because it does not replace a term of imprisonment but is imposed in addition to imprisonment). Nor did the legislature attempt to narrow the meaning of probation or supervision to only those instances in which Texas state courts impose them. Thus, we conclude that the plain meaning of supervision as used in Section 11.002(a)(4)(A) does not mean only Chapter 42A

community supervision and includes post-imprisonment supervised release ordered under 18 U.S.C.A. § 3583(a). 15

The evidence showed that during Mason's post-imprisonment supervised release, she had to report to a probation officer immediately upon her discharge from federal custody, refrain from committing any other crimes during her period of supervised release, and be subject to taking random drug tests. During that time, she was subject to the oversight of—supervised by—the United States probation office for the Northern District of Texas. Thus, Mason's term of supervised release under 18 U.S.C.A. § 3583(a) was part of her sentence to be served and was included within the plain meaning of the word supervision in Section 11.002(a)(4)(A). ¹⁶

¹⁵Because we conclude that the term supervision, as used in Section 11.002(a)(4)(A), is unambiguous, we need not apply the rule of lenity as urged by Mason. *See* Tex. Gov't Code Ann. § 311.035 (providing that a court must construe in the actor's favor a statute or rule not included in the Penal Code or Health and Safety Code "that creates or defines a criminal offense or penalty" if "any part of the statute or rule is ambiguous on its face or as applied to the case"); *Johnson*, 219 S.W.3d at 388.

¹⁶Although we need not consider the legislative intent of Section 11.002(a)(4)(A), see Lang, 561 S.W.3d at 180, we note that it nevertheless supports our plain-language conclusion. Historically, absent a pardon, convicted felons were not authorized to vote in Texas after their convictions became final. See Act approved Aug. 23, 1876, 15th Leg., R.S., ch. 166, § 13, 1876 Tex. Gen. Laws 306, 307, reprinted in 8 H.P.N. Gammel, The Laws of Texas 1822-1897, at 307 (Austin, Gammel Book Co. 1898); see also Tex. Const. art. VI, § 1, cmt. In Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1978), the Fifth Circuit described the constitutional and statutory framework for the disenfranchisement and re-enfranchisement of convicted felons in the following manner:

⁽¹⁾ any person convicted of a felony in any court, state or federal, is automatically disenfranchised; (2) a person convicted of a felony in

Texas state court and placed on probation may have his conviction set aside and be reenfranchised by the court in which he was convicted, or he may be reenfranchised by gubernatorial pardon; (3) a person convicted of a felony in federal court may be restored to suffrage only by presidential pardon.

Id. at 1112 (citing Hayes v. Williams, 341 F. Supp. 182, 188 (S.D. Tex. 1972), for the proposition that the former Election Code re-enfranchisement provision applied to persons convicted of federal as well as state felonies ("The Court must also reject the contention that the disability applied to convicted felons in the Texas Constitution and in the Texas Election Code disqualifies only those persons convicted in a State court.")).

By 1985, when the legislature codified the Election Code, an unpardoned felon could regain eligibility to vote if the person "received a certificate of discharge by the Board of Pardons and Paroles or completed a period of probation ordered by a court and at least two calendar years ha[d] elapsed from the date of the receipt or completion." Act of May 13, 1985, 69th Leg., ch. 211, § 1, 1985 Tex. Gen. Laws 802, 811. But cf. R.R.E. v. Glenn, 884 S.W.2d 189, 193 (Tex. App.—Fort Worth 1994, writ denied) (op. on reh'g) (noting, in determining whether juror convicted of a felony was disqualified from jury after having successfully completed and been discharged from probation, that "[n]othing in the Constitution contemplates the full restoration of the rights of felons other than by executive pardon"). In 1997, the legislature amended Section 11.002(a)(4)(A) to the current version. See Act of May 26, 1997, 75th Leg., R.S., ch. 850, § 1, 1997 Tex. Gen. Laws 2721, 2721 (HB 1001).

The House Committee Report Bill Analysis for HB 1001—containing Section 11.002—notes that the purpose of the amendment was "[t]o eliminate the confusion as to when an ex-felon regains the right to vote," which had arisen because "discharge papers are issued upon release from a TDCJ facility, however, a person may continue on parole for some period." H. Elections Comm., Bill Analysis, Tex. H.B. 1001, 75th Leg., R.S. (1997). The House Research Organization Analysis notes that supporters of the amendment urged that "[b]ecause individuals can be in varying stages of the criminal justice system, there is often uncertainty about when the two year waiting period begins. Individuals, criminal justice professionals, and election personnel themselves have been uncertain about when people become eligible to vote." H. Research Org., Bill Analysis, Tex. H.B. 1001, 75th Leg., R.S. (1997). Thus, the legislative history does not reveal an intent to exempt persons convicted of federal crimes from serving all of their sentences before regaining eligibility. Instead, the intent was to eliminate confusion about when a convicted person could regain the

C. To cast a provisional ballot is to "vote" under Election Code Section 64.012(a)(1).

Mason next contends that a person does not "vote" under Section 64.012(a)(1) by casting a provisional ballot.¹⁷ According to Mason, provisional ballots are not votes because they may or may not count: "They are conditioned on the eligibility of the voter." Thus, Mason argues that because her provisional ballot was rejected, she did not "vote" under Section 64.012(a)(1). Pertinent to this point, she argues as part of her fourth point that HAVA requires states to allow individuals who believe they are eligible to vote to cast a provisional ballot, without fear of criminal prosecution if they are actually ineligible to vote.¹⁸

1. Plain meaning of the verb "vote"

Like the term "supervision" in Section 11.002(a)(4)(A), the verb "vote" is not

right to vote by requiring that person to have first successfully finished every part of that person's sentence for the particular offense for which she was convicted. By eliminating the need for a document that only a Texas institution issued—a certificate of discharge from the Texas Board of Pardons and Paroles—the legislature further signaled an intent that the reinstatement of voting eligibility not be limited to convicted felons discharged from only a state facility.

¹⁷Counsel argued at the new-trial hearing, "I think the common meaning of voting is where you actually affect the election by your choice on a ballot," and "no amount of evidence proving that [Mason] cast a provisional ballot while on supervised release will ever be sufficient to uphold the conviction of illegal voting."

¹⁸Because HAVA informs our construction of the verb "vote" in the Texas Election Code, we consider it in the context of the Section 64.012 statutory-construction argument in Mason's first two points.

defined in the Election Code.¹⁹ But it is defined in the Penal Code when proscribing the bribery or coercion of a voter: Penal Code Section 36.01(4) defines the verb "vote" as meaning "to cast a ballot in an election regulated by law." Tex. Penal Code Ann. § 36.01(4). This definition is consistent with the common understanding of the verb.

Black's Law Dictionary defines the verb "vote" as "[t]he act of voting" and voting as "[t]he casting of votes for the purpose of deciding an issue." *Vote, Voting,* Black's Law Dictionary. It defines "cast" as "[t]o formally deposit (a ballot) or signal one's choice (in a vote)." *Cast, id.* To cast a ballot, then, is to express one's choice, i.e., to vote. Similarly, Webster's Third New International Dictionary defines the verb "vote" as "to express one's views in response to a poll," "to express an opinion," or "to choose or endorse by vote." Webster's Third New Int'l Dictionary 2565 (2002). By comparison, Black's defines the noun "vote" as "[t]he expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication." *Vote,* Black's Law Dictionary.

Pertinent to a different issue, an intermediate court of appeals has noted that "[c]ommon definitions of the verb 'vote' are '[to] express one's preference for; endorse by a vote,' 'to declare or pronounce by general consent,' . . . 'to enact, elect,

¹⁹Solely for purposes of Title 14 of the Election Code, Section 221.003 defines an "illegal vote"—a noun—as "a vote that is not legally countable." Tex. Elec. Code Ann. § 221.003.

establish, or determine by vote,' or 'to declare or decide by general consent." Nash v. Civil Serv. Comm'n, Palestine, 864 S.W.2d 163, 165 (Tex. App.—Tyler 1993, no writ) (quoting 1970s and 1980s versions of American Heritage and Random House dictionaries); see also Wooley v. Sterrett, 387 S.W.2d 734, 740 (Tex. App.—Dallas 1965, no writ) ("Reason and common sense dictate that the verb 'vote' carries with it the implication of affirmative choice by action.").

None of these definitions conditions the definition of the verb "vote" on whether the choice expressed is thereafter counted as part of the poll results. Thus, to cast or deposit a ballot²⁰—to vote—can be broadly defined as expressing one's choice, regardless of whether the vote actually is counted.

2. HAVA

Several federal statutes address voting and voting rights, including HAVA. Congress had several purposes behind HAVA, which it implemented after the 2000 election. ²¹ Fla. Democratic Party v. Hood, 342 F. Supp. 2d 1073, 1076 (N.D. Fla. 2004). One purpose was to alleviate problems with voters arriving at polling places believing they are eligible to vote but not being allowed to vote because the election workers

 $^{^{20}\}mathrm{As}$ we explain below, the Election Code's provisional-ballot provisions speak in terms of "casting" such a ballot.

²¹HAVA is Congress's attempt to "strike a balance between promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other." *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008).

could not find their names on the list of qualified voters.²² Sandusky Cty. Democratic Party v. Blackwell, 387 F.3d 565, 569 (6th Cir. 2004). "HAVA dealt with this problem by creating a system for provisional balloting, that is, a system under which a ballot would be submitted on election day but counted if and only if the person was later determined to have been entitled to vote." Id. HAVA also required that states wishing to receive federal funding for updating and improving voting systems implement "in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State." 52 U.S.C.A. § 21083(a)(1)(A) (West 2015).

Provisional ballots are available because election workers do not have perfect knowledge on election day; they may not know whether a person ultimately will or will not be determined to have been eligible. Affording a potential voter a reliable—and enforceable—means of asserting his or her right to vote on election day, even if election workers assert the voter is ineligible, serves at least three important purposes. First, it tells election workers that their decisions are subject to check. . . . Second, allowing provisional balloting provides some assurance that eligibility determinations have been made correctly. Rather than a hurried decision by a volunteer amid the chaos of a busy election day, the result is a decision by appropriate officials at a more leisurely pace with greater transparency. And third, even if the actual decision with respect to any ballot is not changed and the number of votes counted for each candidate ultimately remains the same, allowing provisional balloting improves the *perception* that the election has been conducted fairly.

Fla. Democratic Party v. Hood, No. 4:04 CV 395 RH/WCS, 2005 WL 2137016, at *4 (N.D. Fla. Sept. 1, 2005).

²²As one federal court has articulated,

By adopting the provisional-voting section of HAVA, Congress sought to protect the right to vote when voters "appear at the proper polling place and are otherwise eligible to vote." See Common Cause Ga. v. Kemp, 347 F. Supp. 3d 1270, 1292–93 (N.D. Ga. 2018) (emphasis added) (citing *Hood*, 342 F. Supp. 2d at 1078–79). The person who claims eligibility to vote, but whose eligibility to vote at that time and place cannot be verified, is entitled under HAVA to cast a provisional ballot, as well as to have that vote counted if the person is duly registered and eligible. See 52 U.S.C.A. § 21082(a)(2), (4) ("If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law."). Thus, HAVA requires that before exercising the right to cast a provisional ballot, a person must affirm that she is registered and eligible to vote. 23 Id. § 21082(a)(2). This is the only permissible requirement that may be imposed upon a would-be voter before permitting that voter to cast a provisional ballot. Sandusky, 387 F.3d at 574. Although

²³A person who intentionally or knowingly provides false information in connection with voting is subject to criminal liability under both federal and Texas law. *See* 52 U.S.C.A. § 20511(2) (West 2015) (fine and up to five years' imprisonment); Tex. Elec. Code Ann. § 13.007 (class B misdemeanor to knowingly making false statement on registration application), § 276.013(a)–(b) (Class A misdemeanor to knowingly or intentionally make any effort to "cause . . . a ballot to be obtained, or a vote to be cast under false pretenses" or to knowingly or intentionally make any effort to "cause any intentionally misleading statement, representation, or information to be provided . . . to an election official[] or . . . on . . . any other official election-related form or document").

"HAVA is quintessentially about being able to *cast* a provisional ballot," whether a provisional ballot will be counted—i.e., whether the person is a qualified, eligible voter—is a determination left to the states. *Id.* at 576–77.

Thus, HAVA's provisional-ballot procedure and centralized-voter-registration-list requirement are intended to prohibit election workers and officials from preventing an otherwise qualified and eligible voter from voting. But in doing so, it presumes and does not diminish individual voters' responsibility to determine if they are properly registered and eligible to vote under state law, as evidenced by its affirmation requirement.

3. Texas Election Code's implementation of HAVA's provisional-ballot requirement

In 2003, the Texas Legislature amended the Election Code "to implement" HAVA. S. Research Ctr., Bill Analysis, Tex. H.B. 1549, 78th Leg., R.S. (2003); H. Elections Comm., Bill Analysis, Tex. H.B. 1549, 78th Leg., R.S. (2003). Among other things, the legislature

- mandated that the Secretary of State implement and maintain a statewide computerized voter-registration list "that serves as the single system for storing and managing the official list of registered voters in the state" and required the Secretary of State to include certain information in that list;
- required the Secretary of State to adopt rules for an administrative-complaint procedure for certain types of voting-related grievances;

- provided a procedure for persons to cast provisional ballots and required election authorities responsible for preparing the official ballots to also prepare provisional ballots "for use by . . . voter[s] who execute[] a[statutorily required] affidavit";
- amended the types of identification acceptable for voting;
- amended the provision making it an offense for an election official to knowingly permit an ineligible voter to vote "without having been challenged" to exclude criminal liability when the official allows a voter to cast a provisional ballot in accordance with the prescribed procedure;
- set forth procedures for handling, delivering, accepting, and disposing of provisional ballots and for the preservation of records on provisional ballots;
- required voter registrars to treat rejected provisional ballots containing the information necessary to enable a person to register to vote as registration applications for future elections;
- required the Secretary of State to implement a system by which a provisional voter could obtain free information about that vote's disposition; and
- designated the Secretary of State as the state office to provide information regarding voter-registration procedures.

Act of May 28, 2003, 78th Leg., R.S., ch. 1315, 2003 Tex. Gen. Laws 4819, 4821–31. Importantly, the legislature did not amend Section 64.012(a)(1) or Section 11.002(a)(4)(A).

The Election Code procedures for "accepting voter[s]" for voting specifically address provisional ballots. When "offering to vote" at a polling place, a voter must present statutorily described photo identification or, upon sworn affidavit subject to penalty of perjury, substitute identification.²⁴ Tex. Elec. Code Ann. §§ 63.001(b), (i), 63.011(a), (b). If the voter does so, is on the list of registered voters for the precinct, and the voter's identity can be verified from the identification, the voter must be accepted for voting. Id. § 63.001(d). A voter who presents the required identification, like Mason, but who is not on the list of registered voters for the precinct and cannot produce a voter-registration certificate, must "be accepted for provisional voting" if the voter executes a Section 63.011 affidavit. Id. §§ 63.009, 63.011 (providing that a person "may cast a provisional ballot if the person executes an affidavit stating that the person . . . is a registered voter in the precinct in which the person seeks to vote; and . . . is eligible to vote in the election" (emphasis added)). Thus Texas law, in implementing HAVA, provides a person the statutory right to cast a provisional ballot with proper identification (or the proper affidavits and follow-up procedures in lieu of identification) and the required affirmation of registration and eligibility, regardless of whether the election official knows with certainty that the person is ineligible to vote.

²⁴The voter may also vote provisionally without identification but with the duty to present statutorily acceptable identification to the voter registrar, or sign a statutorily prescribed affidavit in the voter registrar's presence, within six days of the election. Tex. Elec. Code Ann. §§ 63.001(g), 65.054(b)(2)(B), (C), 65.0541.

The Election Code further explains what happens after a voter is accepted for voting: "[T]he voter shall select a [provisional] ballot, go to a voting station, and prepare the ballot." *Id.* § 64.001. The Election Code's instructions for marking ballots do not distinguish between regular and provisional ballots. *Id.* §§ 64.003–.006. While a nonprovisional voter must deposit a ballot "in the ballot box used for the deposit of marked ballots," *id.* § 64.008(a), a provisional voter must enclose the voter's "marked" ballot "in the envelope on which the voter's executed affidavit is printed," "seal the envelope," and deposit it in a box dedicated to provisional ballots, *id.* § 64.008(b). Further, "[a]t the time a person *casts* a provisional ballot under Subsection (b), an election officer shall give the person written information describing how the person may use the free access system established under Section 65.059 to obtain information on the disposition of the person's vote." *Id.* § 64.008(c) (emphasis added), § 65.059.

Thus, after a voter who is not on the poll list affirms that he or she is registered and eligible, the Election Code procedures speak in terms of that person's casting a provisional ballot, which, as we have explained, is synonymous with "to vote" a provisional ballot.

4. Texas's legislative scheme implementing HAVA does not indicate that the verb "vote" in the illegal-voting statute excludes casting a provisional ballot.

Both HAVA and the Texas Election Code contemplate that a provisional voter will, once accepted for voting, mark a ballot, that is, indicate that voter's choices on the provisional ballot. Nothing in Texas's statutory scheme (which specifically

implements HAVA) indicates that a person who otherwise meets the requirements for provisional voting, fills out and signs an Affidavit of Provisional Voter, is given a provisional ballot, marks that ballot with the person's choices for each particular office, and deposits that ballot into the provisional voting box does not "vote" as contemplated by Section 64.012(a)(1), the statute under which Mason was convicted.

Mason argues that the provisional-balloting provisions in Texas shift the obligation of knowing an individual voter's legal eligibility to vote away from the voter to the election officials who after the election must review the provisional ballots for voter eligibility to determine whether those votes will be counted: "We should know who's qualified and who is not qualified to vote. And the way that we find out, or at least the way that we're supposed to find out[,] is the provisional ballot." But by allowing a person to be criminally prosecuted for voting illegally when that person does not subjectively know that doing so violates the law, the Texas Legislature has long placed the primary burden for knowing whether an individual voter is legally entitled to vote on that individual, as well as (originally) on election officials at the polling place.²⁵ When Texas ultimately amended the Election Code to implement

²⁵Under the current Election Code, an election officer commits an offense by knowingly permitting an ineligible voter to vote "other than as provided by Section 63.011," the provisional-ballot authorization. *Id.* § 63.012(a)(1). Before the 2003 amendments to the Election Code, the prior version of Section 63.012 made it an offense for an election official to knowingly permit an ineligible voter to vote "without having been challenged." Act of May 13, 1985, 69th Leg., R.S., ch. 211, § 1, 1985 Tex. Gen. Laws 802, 880.

HAVA—enacted with a purpose of preventing election officials from turning away voters at polling places based on those election officials' subjective beliefs—it took away the burden and responsibility of confirming a potential voter's legal eligibility from the election officials at the polling place. But nothing in the 2003 amendments to the Election Code or the current version of the Election Code regarding provisional voting evidences a legislative intent to shift the primary burden (and risk) of confirming legal eligibility away from the individual voter to the election officials later charged with reviewing provisional ballots to confirm that voter's eligibility. Therefore, whether this primary burden should in the future remain with the individual voter under Section 64.012(a)(1) is a question for the Texas Legislature.

We hold that the word "vote" in Section 64.012(a)(1) includes in its plain meaning the act of casting a provisional ballot. Having determined under a de novo review that the plain language of Section 11.002(a)(4)(A) and Section 64.012 applies to Mason's situation,²⁶ we now apply the *Jackson* standard to the evidence.

D. Mason's conviction supported by sufficient evidence

Here, the indictment alleged that Mason

[d]id . . . vote in an election in which she knew she was not eligible to vote . . . , to-wit: the 2016 General Election, after being finally convicted of the felony of Conspiracy to Defraud the United States, in the United States District Court of the Northern District of Texas, Fort Worth Division, on March 16, 2012, in case number 4:11-CR-151-A(Ol), and Defendant had not been fully discharged from her sentence for the

²⁶See supra n.15.

felony including any court ordered term of parole, supervision and probation.

The indictment sufficiently tracked the language of the applicable statutes. *Id.* §§ 11.002(a)(4)(A), 64.012(a)(1). Thus, the State did not alter the statutory proof requirements—for purposes of determining a hypothetical jury charge—in the way it worded the indictment. *See Thomas v. State*, 444 S.W.3d 4, 8–9 (Tex. Crim. App. 2014) (explaining that if the State lists only one of multiple manner and means of committing the offense in the indictment, the hypothetically correct jury charge would measure sufficiency of the evidence to prove only the charged manner and means); *Malik*, 953 S.W.2d at 240 (explaining that measuring sufficiency against hypothetically correct jury charge "ensures that a judgment of acquittal is reserved for those situations in which there is an actual failure in the State's proof of the crime"). Although much of the State's questioning and proof at trial focused on whether Mason subjectively knew that being on supervised release made her legally ineligible to vote, the State did not plead her subjective belief in the indictment.

Mason does not dispute that she filled out the Affidavit of Provisional Voter form, signed it, received a provisional ballot pursuant to her statutory right, went to a voting machine and selected her preference, and deposited the provisional ballot in the box marked for it. The evidence also shows that Mason knew she was on supervised release when she did so. *See Thompson*, 9 S.W. at 486–87; *Jenkins*, 468 S.W.3d at 672–73; *Medrano*, 421 S.W.3d at 884–85. The evidence does not show that

she voted for any fraudulent purpose. But the State did not need to prove any motive for her actions. See Clayton v. State, 235 S.W.3d 772, 781 (Tex. Crim. App. 2007) (noting that motive is not an essential element of an offense that the State must prove beyond a reasonable doubt); cf. Ortega v. State, No. 02-17-00039-CR, 2018 WL 6113166, at *1 (Tex. App.—Fort Worth Nov. 21, 2018, no pet.) (mem. op., not designated for publication) (involving prosecution for illegal voting in which noncitizen, legal permanent resident was able to register and vote twice in Dallas County even though she truthfully indicated on her registration application that she was not a United States citizen). And as we have explained, not knowing the law is no excuse for the conduct prohibited under Election Code Section 64.012(a)(1). Although Mason may not have known with certainty that being on supervised release as part of her federal conviction made her ineligible to vote under Texas law or that so voting is a crime—and although she testified that if she had known she would not have voted—she voted anyway, signing a form affirming her eligibility in the process despite the fact that she was not certain and may not have read the warnings on the affidavit form. Under the plain language of the current law as promulgated by the Texas Legislature, this evidence is sufficient to prove that she committed the offense of illegal voting.

Although Mason's trial counsel suggested generally that she had made "a mistake," Mason has not urged on appeal that the evidence raised either a mistake-of-law affirmative defense or mistake-of-fact defense or that the trial judge's implicit

rejection of either defensive issue is not supported by the evidence. See Tex. Penal Code Ann. §§ 2.03(c), 2.04(c), 8.02–.03; Walters v. State, 247 S.W.3d 204, 208–09 (Tex. Crim. App. 2007); cf. Doyle v. State, No. 09-14-00458-CR, 2016 WL 908299, at *4-6 (Tex. App.—Beaumont Mar. 9, 2016, pet. ref'd) (mem. op., not designated for publication) (reviewing sufficiency of jury's rejection of raised mistake-of-law affirmative defense). Nor do we think that the evidence raised either one of them. Mason's claimed lack of knowledge that being on supervised release made her ineligible—as opposed to an argument that she mistakenly did not know she was on supervised release—could not have raised a mistake-of-fact defense because a belief that a proscribed action is not unlawful is not a mistake of fact. See Vitiello v. State, 848 S.W.2d 885, 887 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd); see also Tex. Penal Code Ann. § 8.02(a) (providing that defense is available if mistake negates culpable mental state for offense). And a mistake-of-law affirmative defense is available only when the defendant acted in reasonable reliance on

(1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question . . . or (2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.

Tex. Penal Code Ann. § 8.03(b). Mason expressly disclaimed relying on the warning language in the provisional-ballot affidavit, and she has not argued at trial or on appeal that she relied on an official statement of the law that led her to reasonably believe

that she *was* eligible to vote. Thus, neither a mistake-of-fact defense or a mistake-of-law affirmative defense would be included in the hypothetically correct jury charge by which we must measure the evidence's sufficiency. *See Jenkins*, 493 S.W.3d at 599; *cf.* Tex. Code Crim. Proc. Ann. art. 36.14; Tex. Penal Code Ann. *2.03(c)*, 2.04(c); *Walters*, 247 S.W.3d at 208–09.

Based on the foregoing, we hold that the evidence is sufficient to support Mason's conviction. We therefore overrule Mason's first two points.

IV. No HAVA Preemption

Mason argues in her fourth point that to the extent Section 64.012(a)(1) allows her conviction for submitting a provisional ballot, it is preempted by HAVA through

²⁷But even if some evidence could be considered to raise a mistake-of-law affirmative defense—if the trial judge could have reasonably inferred from the evidence that Mason had read the warnings and if the warnings themselves could be construed as a possible grant of permission by the Secretary of State for purposes of raising the affirmative defense—all of the evidence nevertheless supports a conclusion that Mason did not prove that affirmative defense because the judge could have believed that reliance on the affidavit's warnings to claim eligibility would have been unreasonable. See Butcher v. State, 454 S.W.3d 13, 20 (Tex. Crim. App. 2015) (providing standard of review for factfinder's rejection of a raised affirmative defense). The warnings make clear that a convicted felon must meet certain conditions before being allowed to vote, and even though the articulation of those conditions in the affirmation did not track the statute exactly, at the very least they should have served their purpose of warning Mason that as a convicted felon, she could still have a legal impediment to voting. See Doyle, 2016 WL 908299, at *5-6 (holding that factfinder could have determined that voter's reliance on Attorney General opinion was unreasonable when the opinion clearly explained the residency requirements for voting); Cook v. State, No. 09-14-00461-CR, 2015 WL 7300664, at *4-5 (Tex. App.— Beaumont Nov. 18, 2015, pet. ref'd) (mem. op., not designated for publication) (same).

the Supremacy Clause of the United States Constitution²⁸ and thus of no effect. Although the State correctly points out that Mason did not raise this issue in the trial court, to the extent that the reasoning of *Gutierrez v. State*, 380 S.W.3d 167, 173–79 (Tex. Crim. App. 2012),²⁹ applies, we address her argument.

The Supremacy Clause mandates that when federal and state law conflict, federal law prevails. U.S. Const. art. VI, cl. 2; *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). And regulations enacted under Congress's properly exercised power under the Elections Clause supersede those of the State that are inconsistent. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9, 133 S. Ct. 2247, 2253–54 (2013). Under the Supremacy Clause, Congress's purpose in enacting a law is "the ultimate touchstone" in a preemption case, *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 1194 (2009), and we presume that Congress did not intend to preempt state law unless Congress clearly and manifestly indicated its intent to do so. *Maryland v. Lonisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2129 (1981); *Knox v. Brnovich*, 907 F.3d 1167, 1173–74 (9th Cir.

²⁸In her reply brief, she also references the Elections Clause of the United States Constitution. U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

²⁹Gutierrez addressed—despite "ordinary principles of waiver or procedural default"—an unpreserved complaint that a community supervision condition "invade[d] a federal prerogative[] in violation of the Supremacy Clause" because a defendant cannot agree to a condition "that the criminal justice system simply finds intolerable and which is, therefore, by definition, not even an option available to the parties." 380 S.W.3d at 175–77.

2018). But such a presumption does not apply to a preemption analysis when Congress has acted pursuant to the Elections Clause; in that case, "the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre[]emptive intent." *Inter Tribal Council*, 570 U.S. at 14, 133 S. Ct. at 2257 (holding that Arizona law requiring voter registration officials to reject registration application when not accompanied by a state-promulgated citizenship form in addition to form promulgated by federal Election Assistance Commission that NVRA requires states to "accept and use" was preempted by NVRA). Although the Elections Clause empowers Congress to regulate how federal elections are held, it does not authorize Congress to determine voter qualifications, that is, who can vote. *See id.* at 16–17, 133 S. Ct. at 2257–58.

Congress's intent to preempt state law may be explicit or implicit. *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 31, 116 S. Ct. 1103, 1107–08 (1996); *Knox*, 907 F.3d at 1174. Implicit conflict preemption occurs when compliance with both state and federal law is impossible or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377, 135 S. Ct. 1591, 1595 (2015) (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100, 109 S. Ct. 1661, 1665 (1989)); *Knox*, 907 F.3d at 1175. The second circumstance can occur if a state law, although attempting to achieve the same goal as a federal law, enacts an enforcement method that conflicts with the intended federal regulatory system for the federal law, thus "interfer[ing] with

the careful balance struck by Congress." *Arizona v. United States*, 567 U.S. 387, 406, 132 S. Ct. 2492, 2505; *Knox*, 907 F.3d at 1175. But when Congress has not created a comprehensive federal program of enforcement for federal legislation, the state has the "authority to pass its own laws on the subject." *Arizona*, 567 U.S. at 404, 132 S. Ct. at 2503; *Knox*, 907 F.3d at 1175.

Mason contends that the purpose of HAVA's provisional-balloting procedure was to shift the burden of determining a voter's eligibility under state law away from that voter to the state officials who determine after the election whether that provisional ballot should count. She claims that "HAVA is designed to permit people who are *unsure* of their eligibility to cast a ballot that will be counted only if that person is later determined, in fact, to be eligible."

Although states generally retain the power to regulate their own elections, Burdick v. Takushi, 504 U.S. 428, 433, 112 S. Ct. 2059, 2063 (1992), "Congress has erected a complex superstructure of federal regulation atop state voter-registration systems," Inter Tribal Council, 570 U.S. at 5, 133 S. Ct. at 2251. HAVA is part of this superstructure. See Richard F. Shordt, Not Registered to Vote? Sign This, Mail It, and Go Hire a Lanyer, 78 Geo. Wash. L. Rev. 438, 444–48 (2010). HAVA applies only to federal elections and expressly leaves "[t]he specific choices on the methods of complying with the requirements of" the subchapter on election technology and administration, including voter-registration-list maintenance, "to the discretion of the State." 52 U.S.C.A. §§ 21082, 21085 (West 2015); Broyles v. Texas, 618 F. Supp. 2d 661,

692 (S.D. Tex. 2009), aff'd, 381 Fed. App'x 370 (2010); see Shordt, supra, at 450 ("The NVRA and HAVA did not nationalize the registration process.").

In HAVA, Congress did not expressly evidence an intent to preempt all state laws regarding voter registration, types of ballots allowed, or criminal liability for illegal voting. To begin with, HAVA's requirements are expressly conditioned on a State's voluntarily accepting federal funding for voting systems improvement. 52 U.S.C.A. § 20901 (West 2015). Texas did accept that funding and amended its election laws for the purpose of complying with HAVA. Thus, HAVA requires Texas to use the funds consistently with federal election laws, including the NVRA, and expressly prohibits the state from using the funds inconsistently "with the requirements of subchapter III," entitled Uniform and Nondiscriminatory Election Technology and Administration Requirements, in which the provisional-balloting procedure is established. Id. §§ 20901(c), 21082, 21145 (West 2015). But, again, nothing in the NVRA or Subchapter III of HAVA expressly preempts a state from imposing criminal liability for a person's voting, regularly or provisionally, while ineligible. Thus, we must consider whether Texas's prosecution of a provisional voter like Mason under its illegal-voting statute creates an obstacle to the accomplishment and execution of Congress's full purposes and objectives under HAVA.

Like the NVRA, one of HAVA's main purposes was to increase voter registration and participation of eligible voters by reducing unnecessary procedural, administrative, and technical obstacles to voting. *See* Shordt, *supra*, at 444–48; *see also*

Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 192, 128 S. Ct. 1610, 1617 (2008) ("In the [NVRA] Congress established procedures that would both increase the number of registered voters and protect the integrity of the electoral process." (citation omitted)). HAVA expanded upon the NVRA's attempt to enhance states' voter-registration-list maintenance procedures by adding additional restrictions on when names can be purged from voter rolls. See Shordt, supra, at 448; see also 52 U.S.C.A. § 21083(a)(2). But HAVA "does not impose any federal standards on voter registration or voter eligibility, both of which remain state decisions." Browning, 522 F.3d at 1170. Furthermore, HAVA expressly requires a provisional voter to affirm that the voter is both registered and eligible under state law—thus placing that person at risk of federal and state criminal liability if the information is false. 52 U.S.C.A. § 21082(a); see 52 U.S.C.A. § 20511(2) (West 2015); Tex. Elec. Code Ann. §§ 13.007, 276.013(a)—(b).

We conclude that Congress did not evidence an explicit or implicit intent in HAVA's mandated provisional-ballot procedure to preempt state laws that allow illegal-voting prosecutions of persons who are ineligible under state law, nor did Congress, in enacting HAVA, intend to place the burden to determine a voter's state-law eligibility to vote solely on the state officials later charged with counting provisional ballots. Rather, HAVA's provisional-ballot system was created to assist voters who would otherwise be eligible under state law in registering to vote and to facilitate eligible persons' right to vote without being turned away at the polls by

election officials.³⁰ Here, the election workers in this case did not turn Mason away when they could not find her name on the list of registered voters and instead complied with HAVA's and the Texas Election Code's requirements to offer her a provisional ballot so long as she affirmed—as required by both HAVA and the Texas Election Code—that she was registered and eligible to vote.

Because we conclude that HAVA's provisional-ballot procedure does not preempt Mason's prosecution under state law, we overrule Mason's fourth point.

V. Ineffective Assistance of Counsel

In her fifth point, Mason contends that her trial counsel was ineffective for several reasons: (1) failing to move to quash the indictment; (2) failing to move for a directed verdict; (3) failing to present evidence of her lack of knowledge and intent; (4) failing to "explore" (i.e., ask follow-up questions concerning) election judge Dietrich's potential bias against her; and (5) having an actual conflict of interest.

Mason's registration status by looking her up in the online voter database. Although he was unable to find her name in the database and thus confirm her as a registered voter, Dietrich did not call the TCEA to access Mason's registration history, as he had with another ineligible voter that day whose name he was able to find in the database (and to whom he was therefore able to communicate the reason for his ineligibility—that although he was registered, he had not registered at least thirty days before the election). Had Mason's name been in the database, thus prompting Dietrich to call the TCEA, its representative presumably would have been able to give him the same type of information from TCEA's computerized voter-registration system—that Mason's registration had been cancelled because she was on the "SOS Felon List."

A. Preservation

The State contends that Mason preserved only the two ineffective-assistance complaints that she included in her motion for new trial, citing cases in which the appellate complaint was whether the trial court erred in its ruling on a new-trial motion. See State v. Arizmendi, 519 S.W.3d 143, 150–51 (Tex. Crim. App. 2017); State v. Moore, 225 S.W.3d 556, 569–70 (Tex. Crim. App. 2007); Hamilton v. State, 804 S.W.2d 171, 174 (Tex. App.—Fort Worth 1991, pet. ref'd). But an appellant may raise an ineffective assistance complaint, outside of the new-trial context, for the first time on appeal. See Robinson v. State, 16 S.W.3d 808, 810 (Tex. Crim. App. 2000); Reyes v. State, 361 S.W.3d 222, 232 (Tex. App.—Fort Worth 2012, pet. ref'd). Accordingly, we will review all of Mason's appellate complaints of ineffective assistance.

B. First through fourth alleged ineffective grounds

1. Standard of review

To establish ineffective assistance, an appellant must prove by a preponderance of the evidence that her counsel's representation was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013). An appellate court may not infer ineffective assistance simply from an unclear record or a record that does not show why counsel failed to do something. *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012); *Mata v. State*, 226 S.W.3d 425, 432 (Tex. Crim. App. 2007). Trial counsel "should ordinarily be afforded an opportunity to explain his

actions before being denounced as ineffective." *Menefield*, 363 S.W.3d at 593. If trial counsel did not have that opportunity, we should not conclude that counsel performed deficiently unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Nava*, 415 S.W.3d at 308. Direct appeal is usually inadequate for raising an ineffective-assistance-of-counsel claim because the record generally does not show counsel's reasons for any alleged deficient performance. *See Menefield*, 363 S.W.3d at 592–93; *Thompson*, 9 S.W.3d at 813–14.

2. Failure to move to quash indictment

Mason contends that her trial counsel should have moved to quash the indictment because the indictment alleges conduct not prohibited by the statute, i.e., "voting while under *court ordered* parole or supervision." [Emphasis added.] She contends that because Section 11.002(a)(4)(A) specifies a court order only for probation—by requiring that the person must have "fully discharged the person's sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court"—the statute does not contemplate court-ordered supervision as part of a sentence that must be completed before a felon regains the right to vote.

Mason is arguing, in essence, that the statute precludes court-ordered supervised release from disqualifying someone from regaining the right to vote under

Section 11.002(a)(4)(A); thus, the indictment failed to allege an offense.³¹ But as we have explained, the statute disqualifies a convicted felon from voting if she has not completed her entire "sentence." Courts impose sentences, including federal supervised release. *See* Tex. Code Crim. Proc. Ann. arts. 42.01, § 1, 42.02; *see also* 18 U.S.C.A. § 3583(a). It would be contrary to the statute's plain meaning to construe it otherwise. *See Campbell*, 49 S.W.3d at 876; *cf. Tapps v. State*, 294 S.W.3d 175, 177 & n.10 (Tex. Crim. App. 2009) (reciting basic principle that courts stray from statute's literal text only when not doing so would lead to absurd consequences). Thus, we conclude that trial counsel was not deficient for failing to challenge the indictment on this basis.

3. Failure to move for directed verdict

Mason also argues that her counsel was ineffective for failing to move for a directed verdict. Because we have already held that the evidence is sufficient to support the trial court's guilt finding, we likewise hold that trial counsel was not ineffective for failing to move for a directed verdict. *See Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996) (holding that a challenge to a trial court's ruling on a directed verdict motion is a challenge to the sufficiency of the evidence to support conviction); *Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990); *see also*

³¹An indictment must state facts that, if proved, show a violation of the law; if it does not, the court must dismiss the indictment. *See Posey v. State*, 545 S.W.2d 162, 163 (Tex. Crim. App. 1977); *Rotenberry v. State*, 245 S.W.3d 583, 586 (Tex. App.—Fort Worth 2007, pet. ref'd); *see also* Tex. Code Crim. Proc. Ann. art. 21.01 (defining indictment as a grand jury's written statement accusing a person of an act or omission that is a legal offense).

Mooney v. State, 817 S.W.2d 693, 698 (Tex. Crim. App. 1991) (holding counsel is not required to engage in the filing of futile motions); Carreon v. State, No. 04-18-00415-CR, 2019 WL 3805507, at *4 (Tex. App.—San Antonio Aug. 14, 2019, no pet.) (mem. op., not designated for publication) (holding trial counsel not deficient for failing to request a directed verdict after determining that conviction supported by sufficient evidence); Zarnfaller v. State, No. 01-15-00881-CR, 2018 WL 3625618, at *20 (Tex. App.—Houston [1st Dist.] July 31, 2018, no pet.) (mem. op., not designated for publication) (same).

Moreover, the record in this case does not indicate why trial counsel did not move for a directed verdict. Without evidence providing trial counsel's explanation for not doing so, we cannot conclude that counsel was deficient. *See Thompson*, 9 S.W.3d at 813–14.

4. Failure to present evidence of lack of knowledge and intent

Mason contends her trial counsel was ineffective for failing to call additional witnesses to testify to her lack of subjective knowledge and intent to vote illegally. But, as we have explained, her subjective knowledge that voting while on post-imprisonment supervised release was illegal is irrelevant to her conviction. Thus, we likewise hold that counsel was not deficient for failing to call additional witnesses to show her lack of knowledge and intent.

5. Failure to explore Dietrich's alleged bias

Mason further contends that her trial counsel was ineffective for failing to question Dietrich "about his improper communication with the court" after the trial judge informed the parties at the close of Dietrich's testimony that he knew Dietrich personally and that he had seen Dietrich "at the Republican conv[en]tion for Senate District 10," where Dietrich told the trial judge "that . . . [he] was going to see him." But the trial judge explained that he "didn't know [in] what context" he would be seeing Dietrich. Mason's trial counsel did not object or ask to question Dietrich further. He told the judge, "I understand. I have no problem with that."

According to Mason, Dietrich—her neighbor—knew her well and knew she had gone to prison but nevertheless allowed her to fill out a provisional ballot without raising any concern with her about her ineligibility to vote; instead, he "waited a few days and contacted the District Attorney." She appears to argue that had trial counsel questioned Dietrich about the encounter, he could have uncovered evidence that Dietrich was biased against Mason and had an improper motive to report her and testify untruthfully against her.³²

Dietrich did not testify at the evidentiary hearing on the motion for new trial.

But the State had already questioned him on redirect at trial about his reporting of

Mason. According to Dietrich, he had no reason to suspect when Mason voted that

³²Mason's inference is that Dietrich had attempted to improperly influence the trial judge and therefore must have had a bias in favor of prosecuting and convicting her.

she was a convicted felon or was on supervised release and could not vote for that reason; he knew that she "had had something previously, but it was a long time ago, and [he] wasn't even sure whether there had been a conviction."³³ After Mason voted, a worker at the polling place told Dietrich that he was concerned about Mason's voting, prompting Dietrich to call the Tarrant County District Attorney's office the day after the election. When asked if he would have turned Mason away if he had known of her ineligibility, Dietrich said that his training gives him three choices—to let the person vote normally if the person is on the registered voters list and has a valid driver's license, to direct that person to the correct polling location if the person is in the wrong one based on her residence address, or to allow the person to vote provisionally.

At the new-trial hearing, Mason's trial counsel testified that Dietrich was on the witness list; that he had read the names of all the witnesses to Mason before trial and she did not say she knew Dietrich; and that when Dietrich testified, she wrote counsel a note to say that Dietrich was her neighbor. Counsel said that when the judge told the attorneys about his interaction with Dietrich, the judge was "open about it," and counsel did not think "the judge ever said he [had] discussed [the case] with" Dietrich. He did not ask any follow-up questions because the interaction did not disqualify the judge and it was not relevant to the defense.

³³At the time of the election, Dietrich had recently returned from a military tour of Afghanistan.

Mason contends that Dietrich's "motive to color the truth of his testimony in a highly political case such as this one is absolutely central to [her] defense." Mason's defense was that she did not know she was ineligible to vote; part of that defense was to show that she had not read the affidavit before she signed it. The only significant differences between Mason's testimony and Dietrich's had to do with whether he helped her fill out the provisional ballot (his testimony) or whether another worker did (Mason's testimony) and with whether he was lying when he said Mason "appeared" to read the affidavit language admonishing of the eligibility requirements before she signed the Affidavit of Provisional Voter.³⁴ But as we have said, the law does not require that Mason have had subjective knowledge that she was legally ineligible to vote, only that she knew she was still on supervised release when she voted. Mason herself testified that she had signed the affidavit form and cast a provisional ballot. Moreover, the worker who alerted Dietrich to the fact that Mason could have improperly voted testified at trial that Mason voted provisionally, that he watched Mason looking at the form, and that he saw "[h]er finger watching^[35] each line making sure she read it all." Thus, whether Dietrich had an improper motive to allow Mason to vote, to testify that he thought she had read the affidavit, or to alert the District Attorney's office that she had voted would not have affected Mason's

³⁴He had testified at trial that he thought she had read the affidavit because she "paused and took some number of seconds to look over" the left side of the affidavit form—the side with the eligibility warning.

³⁵We assume he meant "following" each line.

defense. We conclude that counsel was not ineffective for failing to question Dietrich further after the trial judge's disclosure.

C. Actual conflict of interest

Finally, Mason argues that her trial counsel had an actual conflict of interest requiring a new trial.

1. Standard of review specific to attorney-client conflicts claims

An attorney's conflict of interest may result in the denial of a defendant's right to effective assistance of counsel. Acosta v. State, 233 S.W.3d 349, 352–53 (Tex. Crim. App. 2007). To prevail on a conflicts-based ineffective-assistance claim, an appellant must show (1) that an actual conflict of interest existed and, (2) in most circumstances, that it "actually colored counsel's actions during trial." Odelugo v. State, 443 S.W.3d 131, 136 (Tex. Crim. App. 2014) (citing Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980)). When a trial judge knows or reasonably should know that a "particular conflict" exists, such as when an attorney or party brings the matter to the judge's attention, the judge must adequately inquire whether the risk that the conflict could adversely affect counsel's representation warrants new counsel; this duty is not triggered if the judge "is aware of [only] a vague, unspecified possibility of conflict." Mickens v. Taylor, 535 U.S. 162, 168–69, 122 S. Ct. 1237, 1242 (2002) (citing Cuyler, 446 U.S. at 347-48, 100 S. Ct. at 1717-18). Thus, two conflicts-based ineffectiveassistance complaints are possible: (1) that the trial court did not conduct an adequate investigation into whether an actual conflict created enough risk of affecting counsel's

representation that new counsel was necessary or (2) that an actual conflict adversely affected counsel's representation. *See Johnson v. State*, 583 S.W.3d 300, 313–17 (Tex. App.—Fort Worth 2019, pet. ref'd) (reviewing whether actual conflict existed but declining to review adequacy of trial court's inquiry because not raised on appeal); *Orgo v. State*, 557 S.W.3d 858, 862 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (holding that trial court adequately inquired into potential conflict and that no actual conflict existed). Mason has raised the second type of complaint.

An actual conflict of interest exists when counsel must choose between "advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the [client's] detriment." *Odelugo*, 443 S.W.3d at 136; *Acosta*, 233 S.W.3d at 355. Mason's argument at trial and on appeal is that counsel had an actual conflict because he had represented her in the federal case, he knew he had told her then that she was ineligible to vote, and he was therefore a fact witness as to the truthfulness of her subjective belief on November 8, 2016, that she could vote.

2. No actual conflict of interest

Trial counsel testified at the new-trial hearing that he had told Mason when she was deciding whether to plead guilty to the federal offense that she would not be able to vote after her conviction. But he had no idea whether she remembered that conversation four years later when she actually voted. Despite Mason's appellate

counsel's³⁶ best efforts to equate trial counsel's telling Mason in 2012 that she would not be able to vote after her conviction with knowledge that Mason was actually aware *in 2016* that she could not vote, appellate counsel elicited no evidence that trial counsel knew that Mason actually remembered in 2016 what he had told her in 2012.

Regardless, trial counsel's knowledge that he had told her in 2012 that she would not be able to vote after being convicted of a felony was not relevant to her defense that in 2016 she did not know that being on supervised release made her ineligible under the law—a defense that was not based on the statute, which as we have explained does not require the State to show a defendant's subjective knowledge of the law absent evidence raising a mistake-of-law affirmative defense. Thus, Mason has not shown that her trial counsel was laboring under an actual conflict of interest.

D. No deficient performance

Having found no support in the record for Mason's claims of deficient performance by her trial counsel, we overrule her fifth point contending that we should reverse her conviction because her trial counsel was ineffective. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069 (noting that we need not address both parts of the test if the appellant makes an insufficient showing on one component).

³⁶Mason's lead appellate counsel filed and argued her motion for new trial.

VI. Void-for-Vagueness Complaint Not Preserved

Mason argues in her third point that Section 64.012(a)(1) is unconstitutionally vague as applied under the United States Constitution. But this complaint must have been timely raised in the trial court for us to be able to consider it on appeal. See Reynolds v. State, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014). Mason raised the unconstitutional-vagueness complaint in an untimely amended motion for new trial, which she withdrew after the State objected to its untimeliness. Thus, under well-established rules of procedural default, we may not review this complaint. See Arizmendi, 519 S.W.3d at 150 (noting that although a motion for new trial may be amended any time within thirty days after sentence is imposed or suspended in open court, "the trial court is barred from considering a ground raised outside the thirty-day period if the State properly objects"); Moore, 225 S.W.3d at 570. We overrule Mason's third point.

VII. Conclusion

The decision to prosecute is, in most cases, beyond this court's capacity to review. See Wayte v. United States, 470 U.S. 598, 607, 105 S. Ct. 1524, 1530 (1985) (noting that the government retains broad discretion to decide who it will prosecute so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute). Likewise, ours is not to question an unambiguous statute's wisdom but rather to apply it as written. See, e.g., Jones v. Del Anderson & Assocs., 539

S.W.2d 348, 351 (Tex. 1976). Accordingly, having addressed and overruled all of Mason's properly preserved points, we must affirm the trial court's judgment.

/s/ Wade Birdwell

Wade Birdwell Justice

Publish

Delivered: March 19, 2020